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No._____

IN THE

Supreme Court of the United States

October Term, 1986

CYRIL H. WECHT, M.D., J.D.,
Former Coroner,

Petitioner,

vs.

ALLEGHENY COUNTY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

DAVID J. ARMSTRONG*
RICHARD C. POLLEY
DICKIE, McCAMEY & CHILCOTE, P.C.
Attorneys for Petitioner
Two PPG Place—Suite 400
Pittsburgh, Pennsylvania 15222
(412) 281-7272

* *Counsel of Record*

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Batavia Times Publishing Co.
Harold L. Berkoben
Pittsburgh, Pa. (412) 881-7463

Questions Presented

I. Does the Pennsylvania Supreme Court's denial of Petitioner's request for an allowance of appeal improperly uphold the Pennsylvania Commonwealth Court's approval of a retroactive exception to the Act of May 15, 1945, P.L. 538, *formerly* 65 P.S. §§191, 192, which deprives Petitioner of due process in a manner as yet unaddressed by this Court?

II. Does the Pennsylvania Supreme Court's denial of Petitioner's request for an allowance of appeal improperly uphold the Pennsylvania Commonwealth Court's approval of a retroactive interpretation of the Act of October 4, 1978, P.L. 883, 65 P.S. §401 *et seq.*, which deprives Petitioner of due process in a manner as yet unaddressed by this Court?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Petitioner, Cyril H. Wecht, M.D., J.D., former Coroner of Allegheny County, Pennsylvania, petitions the United States Supreme Court for a writ of certiorari to review the judgment and opinion of the Supreme Court of Pennsylvania entered in *In Re: Allegheny County Controller's Amended Annual Report 1967-1978; In Re: Allegheny County Controller's 1979 Annual Report* on August 18, 1986.

Opinions Below

The order of the Supreme Court of Pennsylvania was entered August 18, 1986, and is not reported (App. A). The opinion and order of the Commonwealth Court of Pennsylvania was entered March 5, 1985, and is reported at 88 Pa. Commw. 128, 488 A.2d 671 (1985) (App. B). The opinion and order *en banc* of Alfred T. Williams, Jr. and Albert E. Acker, Jr., judges specially presiding, was entered September 8, 1983 in the Court of Common Pleas of Allegheny County. This decision is not reported (App. C). The opinion and adjudication consisting of: Discussion, Findings of Fact, Conclusions of Law, and Verdict of Albert E. Acker, Jr., specially presiding, entered on May 10, 1983 in the Court of Common Pleas of Allegheny County. This decision is recorded at 131 P.L.J. 455 (1983) (App. D).

Jurisdiction

The judgment of the Supreme Court of Pennsylvania (App. A) was entered August 18, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Constitutional Provisions and Statutes

This Petition involves consideration of the following statutory provisions: U.S. Const. art. I, §10 cl. 1; U.S. Const. amend. XIV; Act of May 15, 1945, P.L. 538, *formerly* 65 P.S. §§191, 192 (Act of 1945); Act of October 4, 1978, P.L. 883, 65 P.S. §401 *et seq.* The full text of each of these provisions and statutes is set forth in the Appendix.

STATEMENT OF THE CASE

I. Establishment of the Allegheny County Coroner's Professional Education Fund.

Petitioner Cyril H. Wecht was elected Coroner of Allegheny County, Pennsylvania during November 1969. He served in this capacity until January 1980. As Coroner, Dr. Wecht maintained a series of checking accounts specifically created to aid in the disbursement of monies set aside for the administration and development of the Coroner's Office. These monies were designated the Professional Education Fund ("Fund").

Dr. Wecht's use of the Fund was by no means novel. The two immediate predecessors to the Coroner's post administered the Fund long before Dr. Wecht took office. In 1966, Dr. Hunt, as the newly elected Coroner, decided that his office would begin to perform autopsies and histology studies for coroners outside of Allegheny County. Dr. Hunt therefore created the Fund, declaring that the monies received from these out-of-county professional services would be deposited in a special checking account, the contents of which would be used to finance the various professional and educational expenditures that the Coroner's Office incurred. These Fund expenditures included the payment of seminar and convention fees for Coroner's Office personnel.

In January 1968, Dr. Ralph Stalter became Coroner of Allegheny County. As Coroner, Dr. Stalter continued Dr. Hunt's practice of depositing into the Fund all proceeds received from out-of-county autopsies and histology studies. Dr. Stalter made disbursements for purposes similar to those of Dr. Hunt.

Dr. Wecht replaced Dr. Stalter as County Coroner in November 1969. Dr. Wecht continued his predecessors' practice of depositing into the Fund all proceeds received

from out-of-county autopsies and histology studies. During his next decade in office, Dr. Wecht's expertise and reputation resulted in a considerable expansion of his office's out-of-county services. All monies received from these activities continued to be deposited into the Fund. In addition, Funds earned from the services of other Coroner's Office personnel began to be directed into Fund accounts. These activities included toxicology studies and numerous university and police academy lectures.

During this ten year period, the Fund was used for its intended purpose. Fund revenues supplemented the salary of Dr. Joshua Perper, who had become Chief Forensic Pathologist of the Coroner's Office in 1972. Upon expiration of a government grant, more than one-half of salaries dispensed under the Coroner's Office residency program came from the Fund. Numerous other Office expenses were paid with Fund monies, including paraprofessional employee salaries, secretarial salaries, seminar and training fees, membership dues in professional associations, office equipment and supply purchases, and staff and professional luncheons and dinners.

Fund expenditures continued unabated until July 19, 1979, when the Allegheny County Commissioners, with Dr. Wecht's approval, resolved that Fund revenues from out-of-county services would be placed in the County Treasury. The Commissioners then essentially recreated the Fund, establishing a checking account designated for the same purposes for which the out-of-county revenues had been used since Dr. Hunt's tenure. The only significant difference was that County Commissioners officially approved disbursements under the new funding system.

II. Practices of Pittsburgh Pathology and Toxicology Laboratories, Inc.

During the period from 1964 until 1978, Dr. Wecht owned and operated a private facility known as Pittsburgh Pathology and Toxicology Laboratories, Inc. ("PP&TL"). PP&TL provided area clients with various pathological, toxicological and immunological services. As part of this practice, PP&TL prepared histological tissue slides.

In 1967, Dr. Wecht, in his capacity as County Coroner obtained permission to form a residency program in pathology. Necessary program preparations included applying for an LEAA grant from the Governor's Justice Commission. The LEAA grant proposals specifically stated that the residency program would include the study of tissue slides obtained from both the Coroner's Office and outside sources. Upon LEAA grant approval, the residency program began in 1972. For purposes of acquiring enough tissue slides to supply pathology residents and in order to spend more of his time at the Coroner's Office, Dr. Wecht began to process PP&TL slides at the county facility. This procedure occurred from 1970 until 1978, and was actually undertaken by a Coroner's Office employee as a favor to Dr. Wecht. Typically, the slides were first examined by a resident and then by Dr. Wecht. Once the examination was finished, the slides were returned to PP&TL. Dr. Wecht then billed the histology client for the rendering of his professional analysis. The bills to the histology client in no way reflected any charge for the examination of the slides by the residents.

Since February 1979, Dr. Wecht's surgical slides have been processed at an area hospital without charge. In fact, Dr. Wecht could have chosen to use this hospital's free processing since August 1974. He continued to process the tissue slides at the Coroner's Offices, however, in order to aid the residency program.

III. The County Controller's Successful Attempts to Surcharge Dr. Wecht for Fund Expenditures and PP&TL Tissue Slides.

In October 1979 and May 1980, the Allegheny County Controller's Office filed two reports surcharging Dr. Wecht for all revenue-producing activities he undertook at county facilities, regardless of whether such procedures were of an official or personal nature. The first surcharge report was filed by Controller John Lynch ("Lynch Surcharge"). The second surcharge report was filed by his successor, Frank Lucchino ("Lucchino Surcharge").

The Controller's reports were scheduled to come before the Honorable Silvestri Silvestri in a non-jury trial in the Court of Common Pleas of Allegheny County. Judge Silvestri had been selected with the consent of both parties to preside over the trial. On the eve of trial, however, the Controller's attorneys contacted the Honorable Stephen Zappala, Justice of the Supreme Court of Pennsylvania. As a result of this contact, and based on the recommendation of Justice Zappala, the High Court removed the case from Judge Silvestri and appointed Judge Albert Acker to hear the case for no justifiable reason.

After a non-jury trial, Judge Acker issued a May 10, 1983 opinion surcharging Dr. Wecht $172,410.99. In his opinion, Judge Acker credited Dr. Wecht for those monies that, by virtue of their expenditure for the County's benefit, caused it no actual financial loss. Judge Acker based this credit on the Act of May 15, 1945, P.L. 538, *formerly* 65 P.S. §§191, 192 ("Act of 1945"). The Act states:

> No elected or appointed official of any political subdivision shall be charged for any act, error or omission in excess of the actual financial loss

> sustained by the political subdivision by reason thereof, and the surcharge of any such official shall take into consideration as its basis the results of such act, error or omission and the results had the procedure been strictly according to law.
>
> The provisions of this act shall not apply to cases involving fraud or collusion on the part of such officers, nor to any penalty enuring to the benefit of, or payable to, the Commonwealth.

Act of May 15, 1945, P.L. 538, *formerly* 65 P.S. §§191, 192 (Act of 1945). The Court found that:

> 9. There was no fraud or collusion as to Dr. Wecht proved by clear indubitable evidence.
>
> 10. The Act of 1945, May 15, P.L. 538, No. 210, §1 [65 P.S. §191] applies to the Lynch Surcharge case. In so doing, the Court must consider the results of Dr. Wecht's acts to determine whether or not there have been benefits derived by Allegheny County therefrom.

Adjudication consisting of: Discussion, Findings of Fact, Conclusions of Law, and Verdict of Albert E. Acker, Jr., May 10, 1983 (App. D, page 178a). The Court in applying the Act of 1945 examined the only exception under the act, the fraud or collusion exception, and finding no fraud or collusion applied the Act of 1945.

Dr. Wecht and the Controller filed exceptions to the May 10, 1983 opinion, on which oral argument was heard August 1, 1983 before Judge Acker and Judge Alfred Williams, Jr. The Court issued an opinion and order on September 8, 1983, increasing the surcharge against Dr. Wecht to $252,416.03. The aggregate surcharge increased from $172,410.99 to $252,416.03 because the trial court reversed itself: The September 8 opinion essentially held that Dr. Wecht could not successfully assert he was not liable for expenditures that caused no

actual financial loss to Allegheny County. The court reasoned that this "actual financial loss" defense was unavailable because Dr. Wecht was not "authorized" to make the expenditures in issue.

On March 5, 1985, the Pennsylvania Commonwealth Court affirmed the September 1983 decision of the Court of Common Pleas of Allegheny County, specifically upholding the trial court's refusal to permit Dr. Wecht to raise the Act of 1945's "actual financial loss" defense. The Honorable James Gardner Collins concurred and dissented from that decision stating that he would concur in upholding the Lucchino Surcharge made under the Act of 1978. But Judge Collins declared that he would reverse the lower court with regard to the Lynch Surcharge on grounds that Dr. Wecht should have been able to use the "actual financial loss" defense embodied in the Act of 1945.

The Commonwealth Court also approved the trial court's novel interpretation of the Act of 1978, which was held to bar Dr. Wecht from raising any "actual financial loss" defense embodied in Pennsylvania surcharge case law. On August 18, 1986, the Supreme Court of Pennsylvania denied Dr. Wecht's Petition for Allowance of Appeal. This Petition for Certiorari is taken from that Order. Dr. Wecht submits that the Pennsylvania Supreme Court's denial of his Petition for Allowance of Appeal improperly upholds the Commonwealth Court's approval of novel and retroactive interpretations of the Act of 1945 and the Act of 1978. These interpretations have arbitrarily deprived Dr. Wecht of his property without fourteenth amendment due process.

REASONS FOR GRANTING THE PETITION

I. The Pennsylvania Supreme Court's denial of Petitioner's request for an allowance of appeal improperly upholds the Pennsylvania Commonwealth Court's approval of a retroactive exception to the Act of 1945, which deprives Petitioner of due process in a manner as yet unaddressed by this Court.

Prior to the Pennsylvania Supreme Court's denial of Dr. Cyril Wecht's Petition for Allowance of Appeal on August 18, 1986, the only exception legislatively placed in the Act of 1945 was a "fraud or collusion" exception. If a public official was found to have been guilty of fraud or collusion, the "actual financial loss" section of the Act of 1945 was not applicable. In Dr. Wecht's case he was found to have been free of any fraud or collusion. *Adjudication consisting of: Discussion, Findings of Fact, Conclusions of Law, and Verdict of Albert E. Acker, Jr.*, May 10, 1983 (App. D, page 178a).

The Pennsylvania legislature, recognizing the need to determine which public officials could be surcharged and for what actions they could be surcharged expressly made such clarifications in the Act of 1945. These clarifications are evident from the title of the Act which reads as follows:

> An act relating to the liabilities of elected and appointed officers of the various political subdivisions and limiting surcharges to the actual financial loss sustained.

(Act of May 1945, P.L. 538, No. 210, 65 P.S. 191, 192). Thus, the Act of 1945 applies to *any act*, error or omission of *any* official of *any* political subdivision. Act of May 15, 1945, P.L. 538 formerly 65 P.S. §191 (Act of 1945). When the Act of 1945 became law, it is clear that

it established a mandatory statutory scheme under which an official was to be relieved from surcharge if the surchargable acts caused no financial loss to the political subdivision.

Under the Act of 1945, the following schematic of relief was presented. Initially, under Section 191 the general rule was that no surcharge was to be imposed except to the extent of the actual financial loss to the subdivision. Second, under Section 191, the "loss" to the subdivision equalled the difference between the actual cost of the surcharged action of the official and what such action would have cost had the action been taken strictly according to law. Finally, the *sole* exception to the general rule of surcharge relief under Section 191 was stated in Section 192. Under Section 192 an official was to be denied the statutory relief of Section 191 if he acted fraudulently or collusively when the surcharged action was taken. The trial court specifically found that Dr. Wecht had not committed any fraud and therefore Section 192 would not be applicable in this case. *Adjudication consisting of: Discussion, Finding of Fact, Conclusions of Law, and Verdict of Albert E. Acker, Jr.*, May 10, 1983 (App. D, page 178a).

It is clear that under the Act of 1945 these are the only requirements for its application and there is no additional requirement that the Act only applies to improper actions of officeholders who are "authorized" to expend funds. In *Yenerall Appeal*, 165 Pa. Super. 144, 67 A.2d 565 (1949) a taxpayer appealed from the report of the auditors of a township alleging that one of the township supervisors had expended monies to hire a truck for road repair from his daughter. The Second Class Township Code provided that it was unlawful for the township supervisor to be interested directly or

indirectly in any contract relating to roads. The Pennsylvania Superior Court in rejecting the surcharge held that the evidence disclosed no financial loss to the township, nor any proof of fraud or collusion on the part of the township officer and affirmed a decision for the supervisors. It is clear that the township supervisor had no power to expend monies on a contract in which he had an interest. Yet, the Act of 1945 was found to be applicable.

In *Davis v. Carbon County*, 369 Pa. 322, 85 A.2d 862 (1952), the controller of the county filed an audit of the county commissioners which did not impose a surcharge on them for $21,231.58 expended for the construction of a warehouse. The County appealed the audit. It was determined that certain state laws made it mandatory upon the County officials to obtain the approval of the State Art Commission for the construction of the warehouse since state monies were expended in its construction. In addition, the officials violated certain county laws by failing to obtain the approval of the Court of Common Pleas since county monies were expended in its construction. It was held that the Act of 1945 was applicable and remanded the case to the lower court to see if the plans would be approved by the State Art Commission and Court of Common Pleas and whether any financial loss was suffered. It is clear that the surcharged Commissioners in *Davis* had no authority to spend the money to erect a warehouse using state funds without the approval of the State Art Commission and had no power to expend county funds without the approval of the Court of Common Pleas. However, the Act was found to be applicable.

When the Pennsylvania Supreme Court denied Dr. Cyril Wecht's Petition for Allowance on August 18, 1986, it effectively upheld the Pennsylvania Commonwealth Court's approval of a novel retroactive exception to the Act of 1945. This exception barred Dr. Wecht from raising a defense available under the express terms of the Act, namely that the County could only surcharge Dr. Wecht for the "actual financial loss" it sustained due to the contested expenditures in issue. The Commonwealth Court held that this defense was not available to Dr. Wecht because he was not "authorized to expend funds." *In Re: Allegheny County Controller's Amended Annual Report, 1967-1978; In Re: Allegheny County Controller's 1979 Annual Report*, 88 Pa. Commw. 128, _____, 488 A.2d 671, 674 (1985). This newly forged exception, which the Commonwealth Court believed was embodied in "relevant case law," *id.*, was created long after Dr. Wecht ceased expending the monies that the County Controllers contested. The exception was nevertheless held to apply to Dr. Wecht's case, even though the Act of 1945 is entirely devoid of language giving adequate warning that "authorization" to expend funds is required to make its "actual financial loss" defense applicable. Dr. Wecht submits that this retroactive application of the "authorization exception" violates his constitutional due process right to adequate notice that he would be prevented from raising the defenses available under the Act of 1945. *See* U.S. Const. art. I, §10, cl. 1.

The due process clause of the fourteenth amendment guarantees that a party will not be arbitrarily deprived of property without notice and a fair hearing. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1971); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). The fourteenth amendment's protection of property has been significantly extended to

embrace "any significant property interest." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). In the instant case, the Pennsylvania Commonwealth Court's approval of a retroactive "authorization" exception to the Act of 1945 resulted in the deprivation of Dr. Wecht's monetary property without adequate warning that he could no longer invoke the "actual financial loss" defense expressly available under the Act's terms. Because no adequate warning was given, the Commonwealth Court unfairly barred Dr. Wecht from successfully asserting that Allegheny County could only surcharge him for its actual pecuniary losses springing from the contested expenditures. Dr. Wecht was accordingly surcharged $236,757.93 for expenditures occurring when the Act of 1945 was in effect. *See In Re: Allegheny County Controller's Amended Annual Report*, 88 Pa. Commw. at _____, 488 A.2d at 673. The Commonwealth Court's approval of the newly forged "authorization" exception is therefore an arbitrary and impermissible retroactive judicial pronouncement clearly in violation of Dr. Wecht's constitutional right to due process under the fourteenth amendment. U.S. Const. amend. 14. This pronouncement has no underlying rational, reasonable or substantial basis.

The guarantees embodied in the fourteenth amendment's due process clause can be undermined by retroactive judicial interpretations of state statutes. This is so even though retroactivity analysis most often occurs when a legislative body enacts an *ex post facto* law penalizing a particular criminal act.

This Court has repeatedly refused to limit the application of *ex post facto* principles to criminal cases alone. While the dictates of the *ex post facto* clause of U.S. Constitution Article I, section 10 expressly prohibit,

inter alia, the deprivation of "any defense available according to law at the time when the [criminal] act was committed. . .," *Beazell v. Ohio*, 269 U.S. 167 (1925), the fourteenth amendment due process clause prohibits similar retroactive *civil* legislation when its consequences are particularly "harsh and oppressive." *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 17n.13 (1977) (citing *Welch v. Henry*, 305 U.S. 134, 147 (1938); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 14-20 (1976)).

The penalty imposed upon Dr. Wecht in the present case is clearly of a harsh and oppressive nature, given the large surcharge awarded to Allegheny County under the newly created and retroactive "authorization" exception inserted into the Act of 1945. Because Dr. Wecht had no notice that his expenditures from the Fund and his use of County facilities in preparing tissue slides might one day subject him to civil liability in excess of Allegheny County's actual financial loss, the surcharge awarded under the Act of 1945 is not only monetarily oppressive but clearly constitutes an oppressive dispensation of "justice." The harsh nature of the surcharge levied under the Act of 1945 is highlighted when the punitive aspects of this retroactive penalty are examined. When the Commonwealth Court forged the "authorization" exception, it effectively allowed Allegheny County to benefit twice from Dr. Wecht's contested expenditures. Any awarded surcharge should have been for the sole purpose of compensating Allegheny County for its loss. *Davis v. Carbon County*, 369 Pa. Super. 322, 85 A.2d 862 (1952); *Yenerall Appeal*, 165 Pa. Super. 144, 67 A.2d 565 (1949). By allowing Allegheny County to enjoy the benefits factually determined to flow from the contested expenditures, and then by subsequently upholding a surcharge exceeding

Allegheny County's actual financial loss due to Dr. Wecht's expenditures, the Commonwealth Court transformed the surcharge into a punitive award. Opinion and Order *En Banc* of Alfred T. Williams, Jr. and Albert E. Acker, Jr., September 8, 1983 (App. C). Given the harsh and egregious nature of the $236,757.93 penalty, Dr. Wecht submits that his civil case merits the application of retroactivity analysis of an *ex post facto* nature. *See United States Trust*, 431 U.S. at 17n.13.

Dr. Wecht also submits that *ex post facto* principles are clearly applicable by analogy to judicial decisions in appropriate cases. Although *ex post facto* analysis applies explicitly to legislative acts, this Court has used similar analysis when evaluating judicial pronouncements. In *Marks v. United States*, 430 U.S. 188, 191-92 (1977), Justice Powell stated:

> The *Ex Post Facto* Clause is a limitation upon the powers of the Legislature . . . and does not of its own force apply to the Judicial Branch of government. . . . But the principle on which the Clause is based—the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties—is fundamental to our concept of constitutional liberty. . . . As such, that right is protected against *judicial* action by the Due Process Clause of the Fifth Amendment.

(Emphasis added). In deciding *Marks*, this Court looked to *Bouie v. City of Columbia*, 378 U.S. 347, 353-54 (1964). The *Bouie* opinion approved application of *ex post facto* principles when judicial decisions unconstitutionally impinged upon fourteenth amendment due process:

> [A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, §10, of the

> Constitution forbids.... If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.

See also Rabe v. Washington, 405 U.S. 313 (1972) (cited with approval in *Marks*, 430 U.S. at 192). The *Bouie* Court also stated that "[t]here can be no doubt ... a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Bouie*, 378 U.S. at 352.

Thus, through its decisions in *Marks* and *Bouie*, this Court has approved the notion that *ex post facto* principles can apply when a judicial opinion retroactively interprets a statute in a manner violating due process. In the instant case, the Pennsylvania Supreme Court has, by its denial of Dr. Wecht's Petition for Allowance of Appeal, approved the Commonwealth Court's novel and retroactive use of an "authorization" exception to the Act of 1945. This exception, as applied to Dr. Wecht, violates his fourteenth amendment due process right to notice that he could not raise the "actual financial loss" defense expressly embodied in the Act of 1945. Moreover, the retroactive application of the "authorization" exception runs precisely against the "narrow and precise statutory language" creating a *sole* exception to application of the Act—namely, the provision that the Act of 1945 is inapplicable "to cases involving fraud and collusion" by officials subject to the statute. *Id.*; Act of 1945. Dr. Wecht was not subject to this express, narrow exception because his activities

were held to be free of fraud or collusion. Opinion and Order *En Banc* of Alfred T. Williams, Jr. and Albert E. Acker, Jr., September 8, 1983 (App. C, page 14a).

Accordingly, absent application of this "fraud and collusion" exception, the Commonwealth Court could not properly deny Dr. Wecht the "actual financial loss" defense expressly embodied in the Act of 1945. Because the Commonwealth Court approved a judicially forged, retroactive "authorization" exception to the Act of 1945[1] that denies Dr. Wecht his vested and fundamental fourteenth amendment right to due process, it is submitted that this case merits application of the retroactivity analysis expounded in *Marks* and *Bouie*.

As the preceding discussion indicates, this Court may properly entertain Dr. Wecht's contention that his right to adequate warning under the fourteenth amendment was violated even though the case at bar is civil in nature and involves a retroactive judicial interpretation of a state statute. The Pennsylvania Supreme Court, by its denial of Dr. Wecht's Petition for Allowance of Appeal, improperly upheld the Commonwealth Court's approval of an "authorization" exception to the Act of 1945. This exception was oppressive and punitive in nature, and effectively barred Dr. Wecht from raising the

[1] A number of lower Federal Court decisions have dealt with retroactive judicial interpretation of statutes. *See, e.g., King v. Mintzes*, 559 F. Supp. 409 (E.D. Mich. 1983) (citing with approval *Logan v. Auger*, 428 F. Supp. 396, 403 (E.D. Iowa 1977), which states that judicial interpretation of state statutes in a retroactive manner is permissible as long as it does not violate fourteenth amendment due process by interfering with a vested constitutional right embodied in that amendment. *See also Great Northern Railway Co. v. Sunburst Oil and Refining Co.*, 287 U.S. 358 (1932) (retroactivity analysis with regard to judicial opinion in a civil case); *cf. United States v. Johnson*, 457 U.S. 537 (1982) (the general issue of retroactivity "must be rethought.").

"actual financial loss" defense expressly available under the Act of 1945. This judicially retroactive exception is unconstitutional as to Dr. Wecht because he had no adequate warning that his expenditures were not within the protections of the Act which, on its face, was clearly applicable to his use of the expended monies in issue. Because the Commonwealth Court's decision violated Dr. Wecht's vested and fundamental fourteenth amendment right to due process in a manner and context as yet unaddressed by this Court, sufficient grounds exist to merit the granting of a writ of certiorari to review the Pennsylvania Supreme Court decision below.

II. The Pennsylvania Supreme Court's denial of Petitioner's request for an allowance of appeal improperly upholds the Pennsylvania Commonwealth Court's approval of a retroactive interpretation of the Act of 1978, which deprives Petitioner of due process in a manner as yet unaddressed by this Court.

When the Pennsylvania Supreme Court denied Dr. Cyril Wecht's Petition for Allowance of Appeal, it effectively upheld the Pennsylvania Commonwealth Court's approval of a retroactive interpretation of the Act of 1978. Upon repeal of the Act of 1945, the Commonwealth Court held that a second surcharge, totaling $15,658.10, was properly leveled against Dr. Wecht. The court reached this decision by denying Dr. Wecht the "actual financial loss" defense previously available under the Act of 1945. Rather than continue the firmly established practice of allowing surcharges only when they would compensate pecuniary losses that a county actually incurred, the court instead looked to the Act of 1978 for guidance. Unlike the Act of 1945, the Act of 1978 contains no provisions clearly applicable to surcharge actions. It is, rather, an ethics statute mandating disclosure of financial interests. Despite this clear inapplicability, the Commonwealth Court held that the Act of 1978 provided sufficient ground for denying Dr. Wecht the "actual financial loss" defense that could have been held to apply despite the repeal of the Act of 1945.

The Commonwealth Court's use of the Act of 1978 prompts Dr. Wecht to raise a retroactivity argument similar to the one advanced *supra* in the first section of this Petition. Dr. Wecht submits that the Commonwealth Court's approval of a novel interpretation of the Act of 1978, a non-surcharge

statute, denies him his fourteenth amendment due process right to have adequate warning that a facially inapplicable act would deprive him of the "actual financial loss" defense available under state decisional law despite the repeal of the Act of 1945. This novel interpretation is devoid of any rational, reasonable or substantial basis. As with the Commonwealth Court's interpretation of the Act of 1945, the judicial decision to make the Act of 1978 applicable to surcharges while nullifying the "actual financial loss" defense resulted in the arbitrary deprivation of significant property interests in violation of constitutional due process. *See Boddie v. Connecticut*, 401 U.S. 371 (1971). Similarly, the other arguments advanced in this Petition apply—namely, that retroactivity analysis can discern a fourteenth amendment due process violation even in a civil case involving judicial interpretation of a state statute. Dr. Wecht accordingly incorporates these arguments herein.

The Act of 1978 submits Dr. Wecht to an oppressive and punitive surcharge under the Commonwealth Court's approval of a retroactive interpretation of that statute. By making what is facially an ethics measure the means of denying Dr. Wecht the "actual financial loss" defense that was still embodied in case law implementing the Act of 1945, the Commonwealth Court allowed Allegheny County to benefit twice from Dr. Wecht's contested expenditures. First, Allegheny County was found to have reaped the benefits of Dr. Wecht's Fund expenditures. *Adjudication consisting of: Discussion, Findings of Fact, Conclusions of Law, and Verdict*, May 10, 1983 (App. D, page 110a). Second, Dr. Wecht was nevertheless told to pay a $15,658.10 surcharge to the county. In this respect the surcharge is not only financially oppressive, but entirely punitive. As discussed *supra* in the first section

of this Petition, this Court may accordingly find that retroactivity analysis applies in a civil context, allowing a holding that Dr. Wecht was denied his fourteenth amendment right to adequate warning that he could not raise the "actual financial loss" defense.

Dr. Wecht also submits that the Commonwealth Court's use of the Act of 1978 results in the deprivation of his fundamental vested constitutional right to adequate notice that the "actual financial loss" defense would be unavailable when it was still embodied in decisional law interpreting the use of surcharges in Pennsylvania. As such, the judicial decision to interpret the Act of 1978 in a manner barring the "actual financial loss" defense merits application of retroactivity analysis.

Because the Commonwealth Court's interpretation of the Act of 1978 is unduly punitive and a fundamental fourteenth amendment due process right is involved, this Court may properly entertain Dr. Wecht's contention that his right to adequate warning under the fourteenth amendment was violated even though the instant case is civil in nature and involves a retroactive judicial interpretation of a state statute. The Pennsylvania Supreme Court, by denying Dr. Wecht's Petition for Allowance of Appeal, improperly upheld the Commonwealth Court's approval of the application of the Act of 1978 in a manner barring the availability of the "actual financial loss" defense embodied in Pennsylvania surcharge law. Since the Commonwealth Court's decision violated Dr. Wecht's vested and fundamental fourteenth amendment right to due process in a manner and context as yet unaddressed by this Court, sufficient grounds exist to grant a writ of certiorari in this action.

Conclusion

When the Pennsylvania Supreme Court denied Dr. Wecht's Petition for Allowance of Appeal, it impermissibly approved the Pennsylvania Commonwealth Court's novel and retroactive interpretations of the Act of 1945 and Act of 1978. These interpretations have resulted in the arbitrary deprivation of Petitioner's property without fourteenth amendment due process. For this reason and the reasons stated above, Petitioner's request for a writ of certiorari to review the decision below should be granted.

Respectfully submitted,

DICKIE, McCAMEY & CHILCOTE, P.C.
DAVID J. ARMSTRONG
RICHARD C. POLLEY
Two PPG Place—Suite 400
Pittsburgh, Pennsylvania 15222
(412) 281-7272

Attorneys for Petitioner

APPENDIX A

Order of the Supreme Court of Pennsylvania, Western District

(Logo)

THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

Prothonotary
Irma T. Gardner
Deputy Prothonotary

801 City-County Building
Pittsburgh, Pa.
15219
(412) 565-2816

August 22, 1986

David J. Armstrong, Esquire
Richard C. Polley, Esquire
Dickie McCamey & Chilcote, P.C.
Two PPG Place, Suite 400
Pittsburgh, PA 15222

Received
Aug 25 1986
Dickie McCamey & Chilcote

In Re: Allegheny County Controller's Amended Annual Report 1967-1978

In Re: Allegheny County Controller's 1979 Annual Report Petition of Cyril H. Wecht, Former Corner Nos. 196 and 197 W.D. Allocatur Dockets, 1985

Gentlemen:

The Court has entered the following Order on your Petitions for Allowance of Appeal in the above matters:

"August 18, 1986

Petition denied.

PER CURIAM

Larsen and Papadakos, JJ.,
did not participate in
this matter."

Very truly yours,

IRMA T. GARDNER
Irma T. Gardner
Deputy Prothonotary

ITG/djp

cc: Louis Gold, Esquire
104 Court House
Pittsburgh, PA 15219

Honorable Albert E. Acker

APPENDIX B

Opinion and Order of the Commonwealth Court of Pennsylvania

IN THE COMMONWEALTH COURT
OF
PENNSYLVANIA

No. 2751 C.D. 1983
No. 2805 C.D. 1983

IN RE: ALLEGHENY COUNTY CONTROLLER'S AMENDED ANNUAL REPORT 1967-1978,

IN RE: ALLEGHENY COUNTY CONTROLLER'S 1979 ANNUAL REPORT,

CYRIL H. WECHT, M.D., J.D.,
Former Coroner,

Appellant.

BEFORE:
HONORABLE JAMES CRUMLISH, JR., *President Judge*
HONORABLE THEODORE O. ROGERS, *Judge*
HONORABLE ROBERT W. WILLIAMS, JR., *Judge*
HONORABLE JOHN A. MacPHAIL, *Judge*
HONORABLE FRANCIS A. BARRY, *Judge*
HONORABLE JAMES GARDNER COLINS, *Judge*
HONORABLE MADALINE PALLADINO, *Judge*

ARGUED: November 14, 1984

Appendix B—Opinion and Order of the Commonwealth Court of Pennsylvania.

OPINION BY
PRESIDENT JUDGE CRUMLISH, JR.
FILED: March 5, 1985

Cyril H. Wecht, M.D., J.D., appeals an Allegheny County Common Pleas Court order surcharging him for non-county services performed by his office and employees during his tenure as Allegheny County Coroner.

Wecht served as Coroner from January 1970 to January 1980. Without County authorization, he allowed autopsies and tissue slide preparation to be performed for other counties at his office by County employees during their normal working hours, using County equipment and materials. Resulting funds were deposited into private checking accounts maintained by his office, known as the Professional Education Fund, from which Wecht made disbursements. He did not account for or deposit in the County Treasury the funds raised by his services to other counties. Also, without County authorization, tissue specimens accepted by Wecht's private laboratory, Pittsburgh Pathology and Toxicology Laboratory (PP&TL), were delivered to his office for testing. Wecht did not pay the County for this service.

The common pleas court surcharged Wecht $195,389.00 plus $41,368.93 interest with respect to the "Report Concerning the Allegheny County Coroner's Office 1967-1978" (Lynch Surcharge) and $13,254.81 plus $2,403.29 interest with respect to the supplement to the Controller's 1979 Annual Report entitled "In Re: Allegheny County Controller's 1979 Annual Report" (Lucchino Surcharge).

Wecht's major contentions are that (1) he was improperly surcharged for his services to other counties,[1] (2) pursuant to the letter and spirit of Sections 1 and 2 of the Act of May 15, 1945, P.L. 538, *formerly* 65 P.S. §§191, 192 (Act of 1945),[2] surcharges against him should not have exceeded the actual financial loss suffered by the County, and (3) interest should not have been assessed against the principal amounts surcharged.[3] These legal questions are subject to this Court's review. 2 Pa. C.S. §704.[4]

Wecht argues that, because he was not statutorily obligated to perform his services for other counties,[5] they were not part of his "official" duties as Coroner and therefore the constitutional[6] and statutory[7] requirements that funds be turned over to the County do not apply to the resulting monies. However, when this case was before this Court on preliminary objections, we held that because the services were performed under the auspices of the Coroner's office, using County facilities, they were closely associated with the Coroner's office as an official County office. *Lucchino Appeal*, 62 Pa. Commonwealth Ct. 58, 62, 434 A.2d 1323, 1325 (1981).[8] We agree with the trial court that nothing has occurred to diminish the force of the *Lucchino* holding and again conclude "that the services were performed in the Coroners' official capacity, that the Coroners were obligated to report receipt of funds to the county through the Controller[9] and that the surcharges filed by the Controller are the proper avenue to relief." *Id.*

Wecht further contends that the Act of 1945[10] operates to limit the Lynch Surcharge to the actual financial loss suffered by the County.[11] However, a review of the

relevant case law reveals that the Act of 1945 has only been held to apply to improper actions of officeholders who are authorized to expend funds. Wecht had no authority to expend funds.[12] We hold that Wecht may not use the Act of 1945 as a defense to the Lynch Surcharge in light of his constitutional[13] and statutory[14] obligation to have reported and turned over to the County the monies involved in this case. We agree with the trial court that to give Wecht a credit under the Act of 1945 would be to approve an avoidance of the controls properly imposed by the County government.

Wecht finally argues that interest may not be awarded upon surcharges because the statutory right to surcharge an official does not specifically provide for interest.[15] However, by virtue of Section 1930 of the Code,[16] the surcharges became judgments against Wecht's real estate when filed. *Lucchino Appeal*, 62 Pa. Commonwealth Ct. at 64, 434 A.2d at 1326. Pursuant to Section 8101 of the Judicial Code,[17] interest may be awarded from the date of judgment.[18]

We hold that the trial court committed no error of law by imposing either the Lynch Surcharge or Lucchino Surcharge on Dr. Wecht.

Affirmed.

Date: March 5, 1985

JAMES CRUMLISH, JR.
James Crumlish, Jr.
President Judge

Judge Williams, Jr., and Judge Craig did not participate in the decision in this case.

Appendix B—Opinion and Order of the Commonwealth Court of Pennsylvania.

FOOTNOTES

[1] In this appeal, Wecht has only challenged the amount, not the propriety, of the portions of the Lynch Surcharge and Lucchino Surcharge relating to services performed by his office for PP&TL.

[2] Repealed by the Act of November 26, 1978, P.L. 1399.

[3] Wecht also argues that Exhibits 55, 56 and 66 should have been stricken as impermissibly varying from the Controller's claim regarding PP&TL activities. Because the Controller substantially reduced his original $118,305.23 claim, Wecht claims that he was surprised by matters of which he had no notice in the pleadings.

We hold that Wecht was not surprised by the contents of the exhibits because (1) Wecht permitted the exhibits to be admitted without objection and only later claimed that they should be stricken because of the alleged variance, and (2) our review of the evidence reveals that the exhibits were compiled predominantly from Wecht's records.

He further contends that the $58,354.00 amount surcharged for PP&TL activities is speculative and not based on the evidence. We hold that this surcharge amount is supported by substantial evidence.

[4] Due to our resolution of these legal questions, it is unnecessary to address Wecht's collateral contentions.

[5] The duties of the Coroner are set forth in the Second Class County Code (Code), Act of July 28, 1953, P.L. 723, *as amended*, 16 P.S. §§4231-4248.

[6] PA. CONST., art. IX, §4 provides in part:

> County officers shall be paid only by salary as provided by law for services performed for the county or any other governmental unit. Fees incidental to the conduct of any county office shall be payable directly to the county or the Commonwealth, or as otherwise provided by law.

[7] Wecht directs our attention to Section 1801 of the Code, 16 P.S. §4801, and Section 1802 of the Code, 16 P.S. §4802, which require reporting, bookkeeping and transfer to the county of all monies received for "official" services.

Appendix B—Opinion and Order of the Commonwealth Court of Pennsylvania.

[9] The Commonwealth Court issued an Order on November 17, 1981, stating:

> Nothing in this Court's Opinion and Order [in *Lucchino Appeal*], filed September 25, 1981, shall prevent former Coroners Hunt, Stalter and Wecht from raising a defense at trial that the activities at issue were performed in a non-official capacity.

Understanding this Order as requiring it to fully hear Wecht's contentions and prohibiting prejudgment based on the *Lucchino* decision, the trial court allowed Wecht to present a full defense.

[9] Formerly John T. Lynch, now Frank J. Lucchino.

[10] Wecht refers us to Section 1 of the Act of 1945, 65 P.S. §191, which provides:

> No elected or appointed official of any political subdivision shall be surcharged for any act, error or omission in excess of the actual financial loss sustained by the political subdivision by reason thereof, and the surcharge of any such official shall take into consideration as its basis, the results of such act, error or omission and the results had the procedure been strictly according to law.

[11] Wecht's contention is limited to the Lynch Surcharge because the Lucchino Surcharge began to run on February 5, 1979, eleven days after the repeal of the Act of 1945 became effective. The Act of October 4, 1978, P.L. 883, *as amended*, 65 P.S. §§401-413, dealing with conflict of interest, provides that "[n]o public official . . . shall use his public office . . . to obtain financial gain other than compensation provided by law for himself, a member of his immediate family, or a business with which he is associated." 65 P.S. §403(a). We hold that the trial court correctly concluded that this statute controls the Lucchino Surcharge and prevents Wecht from raising the defense of benefit to the County.

Wecht nonetheless argues that surcharging the 1979 Professional Education Fund expenditures unjustly enriches the County. He cites *Zvonick v. Zvonick*, 291 Pa. Superior Ct. 309, 435 A.2d 1236 (1981), for the proposition that restitution must be made if one receives a benefit and it would be unconscionable to retain that benefit. Unlike the *Zvonick* case, where out-of-pocket expenditures were made in reliance on an agreement, Wecht usurped the County's prerogative to

(Footnote continued on following page.)

(Footnote continued from preceding page.)

make expenditures. Under these circumstances, it would not be "unconscionable" to allow the County to retain the alleged benefits conferred by Wecht.

Wecht further argues that failure to recognize a common law "financial loss" rule would impermissively change the character of the surcharges from compensatory to punitive. However, before the effective date of the Act of 1945, no "financial loss" rule was applied. *See In re: Appeal of Sykesville Borough*, 91 Pa. Superior Ct. 335 (1927).

We hold that these arguments are meritless.

[12] The Code provides for disbursement of County monies through warrants drawn on the County treasury by the County Commissioners and countersigned by the Controller, 16 P.S. §§4950-54.

[13] PA CONST., art. IX, §4.

[14] 16 P.S. §11011-12(b).

[15] Section 1901 of the Code, 16 P.S. §4901, reads in pertinent part:

> The controller shall have a general supervision and control of . . . the accounts and official acts of all officers . . . who shall collect, receive or distribute the public moneys of the county . . . . He shall, immediately on the discovery of any default or delinquency, report the same to the commissioners and the court of common pleas of the county, and shall take immediate measures to secure the public moneys . . . .

[16] 16 P.S. §4930 provides:

> The reports of the controller shall be filed among the records of the court of common pleas of the county, and from the time of such filing shall have the effect of a judgment against the real estate of the officer who shall thereby appear to be indebted either to the Commonwealth or to the county.

[17] 42 Pa. C.S. §8101 provides:

> Except as otherwise provided by another statute, a judgment for a specific sum of money shall bear interest at the lawful rate from the date of the verdict award, or from the date of the judgment, if the judgment is not entered upon a verdict or award.

Appendix B—Opinion and Order of the Commonwealth Court of Pennsylvania.

[18] Wecht alternatively argues that assessing interest from the date of filing until the verdict was improper because the surcharge amounts were uncertain or unliquid. However, we agree with the trial court that interest remains owing upon a judgment even if the judgment is opened and a lesser sum is awarded. *See Markofski v. Yanks*, 297 Pa. 74, 78, 146 A. 569, 570 (1929) (lien of judgment not affected by the fact that judgment is opened) and *Sanctis v. Lagerbusch*, 213 Pa. Superior Ct. 483, 488, 249 A.2d 919, 922 (1968) (levy not affected by an order opening a judgment).

He also argues that the Pennsylvania Superior Court has set forth, in *Printed Terry Finishing Co. v. City of Lebanon*, 264 Pa. Superior Ct. 192, 399 A.2d 732 (1979), criteria under which a case may be excepted from the general rule that post-judgment interest is allowable. However, Superior Court in *Printed Terry* did not allow an exemption from post-judgment interest, but merely outlined factors relevant to a determination of whether interest on a reduced verdict *obtained after a new trial on damages* should run from the date of original verdict.

We hold that these arguments are meritless.

Appendix B—Opinion and Order of the Commonwealth Court of Pennsylvania.

IN THE COMMONWEALTH COURT
OF
PENNSYLVANIA

No. 2751 C.D. 1983
No. 2805 C.D. 1983

IN RE: ALLEGHENY COUNTY CONTROLLER'S AMENDED ANNUAL REPORT 1967-1978

IN RE: ALLEGHENY COUNTY CONTROLLER'S 1979 ANNUAL REPORT

CYRIL H. WECHT, M.D., J.D.,
Former Coroner,

Appellant.

ORDER

The order of the Court of Common Pleas of Allegheny County, at No. Misc. 11 April Term 1979, Issue No. 118979 and No. GD80-2600, Issue No. 118979, dated September 8, 1983, is affirmed.

Date: March 5, 1985

JAMES CRUMLISH, JR.
James Crumlish, Jr.
President Judge

CERTIFIED FROM THE RECORD
Mar 5 1985
C. R. HOSTUTLER
Deputy Prothonotary - Chief Clerk

Appendix B—Opinion and Order of the Commonwealth Court of Pennsylvania.

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No. 2751 C.D. 1983
No. 2805 C.D. 1983

IN RE: ALLEGHENY COUNTY CONTROLLER'S AMENDED ANNUAL REPORT 1967-1978,

IN RE: ALLEGHENY COUNTY CONTROLLER'S 1979 ANNUAL REPORT,

CYRIL H. WECHT, M.D., J.D.,
Former Coroner,

Appellant.

BEFORE:
HONORABLE JAMES CRUMLISH, JR.,
President Judge
HONORABLE THEODORE O. ROGERS, *Judge*
HONORABLE ROBERT W. WILLIAMS, JR., *Judge*
HONORABLE JOHN A. MacPHAIL, *Judge*
HONORABLE FRANCIS A. BARRY, *Judge*
HONORABLE JAMES GARDNER COLINS, *Judge*
HONORABLE MADALINE PALLADINO, *Judge*

ARGUED: November 14, 1984

CONCURRING AND DISSENTING
OPINION BY JUDGE COLINS
FILED: March 5, 1985

I dissent. The surcharge action initiated by former County Controller Lynch was brought pursuant to the Act of May 15, 1945, P.L. 538, Nos. 210, 538, *formerly* 65 P.S. §§191, 192. Under the statutory scheme of the Act, absent fraud or collusion, the actual financial loss to the County is all that can be surcharged to the public official in question. Since the appellee has proven no actual "out-of-pocket" losses, the order of the Trial Court should be reversed insofar as it relates to damages accruing under the "Lynch" surcharge.

I concur with the opinion of the majority insofar as it relates to the "Lucchino" surcharge.

JAMES GARDNER COLINS
James Gardner Colins, *Judge*

CERTIFIED FROM THE RECORD
Mar 5 1985
C. R. HOSTUTLER
Deputy Prothonotary - Chief Clerk

APPENDIX C

Opinion and Order *En Banc* of the Court of Common Pleas of Allegheny County

IN THE COURT OF COMMON PLEAS
of Allegheny County, Pennsylvania

CIVIL DIVISION

No. Misc. 11 April Term 1979
Issue No. 118979

No. GD80-2600
Issue No. 118979

IN RE: ALLEGHENY COUNTY CONTROLLER'S AMENDED ANNUAL REPORT 1967-1978

AND

IN RE: ALLEGHENY COUNTY CONTROLLER'S 1979 ANNUAL REPORT.

ALFRED T. WILLIAMS, JR. and
ALBERT E. ACKER, *Judges, Specially Presiding*

Counsel of Record for Frank J. Lucchino,
Controller of Allegheny County:

Byrd R. Brown, Esquire
Doris A. Smith, Esquire
Louis S. Gold, Esquire
104 Courthouse
Pittsburgh, PA 15219

Appendix C—Opinion and Order En Banc of the Court of Common Pleas of Allegheny County.

Counsel of Record for Dr. Cyril H. Wecht, former Coroner of Allegheny County:

David J. Armstrong, Esquire
Richard C. Polley, Esquire
Dickie, McCamey & Chilcote
3180 U. S. Steel Building
Pittsburgh, PA 15219

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Appendix C—Opinion and Order En Banc of the Court of Common Pleas of Allegheny County.

[2] *INTRODUCTION*

This Court has for consideration Exceptions to its Findings of Fact, Conclusions of Law and Verdict filed by the former Coroner of Allegheny County, Dr. Cyril H. Wecht, appellant, and the present Controller of Allegheny County, Frank J. Lucchino, appellee, to two surcharges.[1] The surcharge by the then County Controller of Allegheny County, John Lynch [hereinafter cited as the Lynch Surcharge] was sustained by the Court as to out-of-county autopsies and related services, toxicology and histology testing done at the Allegheny County Coroner's Office in the amount of $143,615.00. The Court further found a surcharge as to monies received by Dr. Wecht for services performed by employees of the Allegheny County Coroner's Office for Dr. Wecht's private testing laboratory known as Pittsburgh Pathology & Toxicology Laboratory, Inc. [hereinafter cited as PP&TL] in the amount of $58,954.00. Finally, it found a surcharge against Dr. Wecht for 72 private autopsies done at the Allegheny County Morgue by Dr. Wecht in the amount of $3,600.00.[2]

[1] The Coroner filed 125 Exceptions while the Controller filed eight Exceptions.

[2] The above-stated surcharges were substantial reductions of that initially filed against Dr. Wecht. In addition, Controller Lynch surcharged Dr. Wecht for medical legal consulting fees which Dr. Wecht performed in his private medical-legal office for attorneys representing families of deceased persons or other parties having an interest in cases arising from the death of an individual. This Court concluded that there was nothing illegal concerning these services and that they were not performed at the Allegheny County Coroner's Office and have no connection with the office. There has been no exception taken by the Controller to these findings, and that portion of the surcharge is, therefore, no longer for consideration.

[3] The Lynch Surcharge, in the amount of $206,169.00, has been reviewed and reaffirmed, with the exception of $10,780.00 which arises from an attempted surcharge for out-of-county services performed by the Morgue in the year of 1973. The Court concludes in Part II of this Opinion that there was inadequate evidence to support that portion of the surcharge.

The Court, however, has reconsidered the granting of a credit to the Lynch Surcharge, and has concluded that, in so doing, it was in error. Therefore, as a part of its Order, the Court finds the Lynch Surcharge to be in the amount of $195,389.00. The second surcharge, filed by the present Controller, Frank J. Lucchino, [hereinafter cited as the Lucchino Surcharge], was for activities at the Allegheny County Coroner's Office from February through July of 1979. The Court denied credits to the Lucchino Surcharge because of a change in the statutes which more fully appears in the Opinion. Therefore, that surcharge in the amount of $13,254.81 is reaffirmed.

This Court also reaffirms the award of interest on the Lynch Surcharge from the date of its filing of October 29, 1979, to the date of the entry of the surcharge of May 10, 1983, now in the amount of $41,368.93. The total of the Lynch Surcharge, principal and interest, is in the amount of $236,757.93.

The Lucchino Surcharge remains as previously [4] found at $13,254.81. The interest on the Lucchino Surcharge is computed from May 2, 1980, the date of its filing through May 10, 1983, the date of the Verdict. That interest is in the amount of $2,403.29. Therefore, the

total of the Lucchino Surcharge, principal and interest, is in the amount of $15,658.10. Thus, the total of the Verdict of principal and interest, as amended from the initial Adjudication of May 10, 1983, is in the amount of $252,416.03.

Dr. Cyril H. Wecht, the former Coroner, now County Commissioner, of Allegheny County, was Coroner for the years 1970 through 1978, while Controller John Lynch was in office. He was Coroner in 1979 and 1980 while the present Controller, Frank J. Lucchino, was Controller.[3] The second surcharge was filed by Controller Lucchino only for the period of February 5, 1979, to July 18, 1979.

The sources of the money which are the subject of the surcharge are: (1) the Professional Education Fund, also known as "PEF," [hereafter cited as PEF] which related to autopsies performed for coroners outside of Allegheny County, and for lab work known as toxicology, performed for hospitals out of Allegheny County by the Toxicology Lab of the Coroner's Office. All monies collected for these services went into accounts in the name of Cyril H. Wecht, M. D. in Mellon National Bank. Monies collected for in-county autopsies in lab work were properly paid by Coroner Wecht to Allegheny [5] County; (2) Pittsburgh Pathology & Toxicology Lab which relates to examination of tissue by Morgue employees on County time and with County equipment; and (3) private autopsies which relate to autopsies performed on the Morgue premises as part of Dr. Wecht's private medical-legal consulting practice. Following trial, this Court

[3] Controller Lucchino continues in office.

requested from parties proposed Findings of Fact. Appellant submitted 177 such findings while appellee submitted 92 proposed findings. The Court passed upon each proposed finding. In addition, because of the hotly-contested issue of whether there was fraud by Coroner Wecht upon the County, the Court made ten findings on that subject.

Through this Opinion an effort is made to address most, but not all, of the issues argued in appellant's 94-page brief filed in support of his Exceptions. Those matters not specifically addressed in this Opinion have, however, been considered and found to be without merit. Appellee submitted a 28-page brief in support of his Exceptions. The Court has addressed all of appellee's Exceptions in its Opinion.[4]

[6] I. DID THE COURT ERR IN SURCHARGING THE APPELLANT, DR. WECHT, FOR FUNDS HE OBTAINED AS A RESULT OF OUT-OF-COUNTY AUTOPSIES, HISTOLOGY, AND TOXICOLOGY PERFORMED AT ACCO BY COUNTY EMPLOYEES?

Although it is contended by appellant that all of the monies generated by out-of-county activities were placed into a "Professional Educational Fund," the records disclose that they were actually placed into three bank

[4] In addition, appellant filed a Brief in Opposition to the Controller's Exceptions and appellee filed a Brief in Reply to the Defendant's Exceptions. All briefs and oral argument have been thoroughly considered.

accounts, two of which were designated, "Cyril H. Wecht, M. D.," 542 Fourth Avenue, Pittsburgh, PA 15219.[5]

The appellant's basic position throughout has been that appellee has no right to require either an accounting or payments of monies if they do not result from "official acts" of the Coroner. As support, appellant raises sections of the Second Class County Code which speak of the obligation of the Controller concerning "public monies" of the County.[6]

[7] Appellant also argues that the instances when the Coroner is obligated to view the body and investigate the facts of the death are delineated by statute,[7] and that none of the items for which he is surcharged are for services which he was legally obligated to perform.

[5] The first checking account, #494-5044, was established on or about January 19, 1970, at Mellon National Bank & Trust Company. The second, #400-8405, was established on or about February 5, 1974, at the same bank. The third account, #016-3483, was established on or about February 1979, titled, "Professional Education Fund." The last account was established subsequent to the disclosure of the accounts and the publicity which surrounded the disclosure. June S. Shulberg, Deputy Coroner, was authorized as a drawer of account, #494,5044, along with appellant Wecht. In the subsequent two accounts, Dr. Wecht alone was authorized to draw upon the account.

[6] Act of 1953, July 28, P. L. 723, Art. XIX, §§1901, 1903 [16 P.S. §§4901, 4930] which deal with filing of reports to the Court of Common Pleas of the County which has the effect of a judgment against the real estate of the officer who appeared to be indebted to the County.

[7] The duties of the Coroner are set forth by statute in the Act of 1953, July 28, P. L. 723, Art. XII, §§1232-1248 [16 P.S. §§4231-4248]. The statutes do not extend jurisdiction to the Coroner for deaths occurring outside of Allegheny County. Deaths within Allegheny County are known as "jurisdictional cases." Nor is there any specific provision for a toxicology lab as part of the Coroner's Office. *Perper vs. Hunt et al.*, 130 P. L. J. 418 (1982).

Although the statutes relied upon by appellant deal with "public money" there are many sections of the Second Class County Code which appellant has ignored by his reliance upon his claimed right to use the PEF as he desires for what he believes to be the best interests of the County.

Appellee is obligated by statute to annually prepare a proposed budget for the next fiscal year reflecting as nearly as possible the estimated revenues and expenditures of the County for which the budget is prepared. 16 P. S. §4981.

The County Commissioners, after appellee has transmitted to them the proposed budget, are obligated to fix the rate of taxation as will raise sufficient sums to meet the expenditures of the County.[8]

[8] By failing to inform either appellee or the Commissioners of monies collected from out-of-county work, they did not know of the additional expenditures of the Coroner's Office, or even a request for the same, and could not include them within the County budget. 16 P.S. §4980(a) makes it unlawful for the Commissioners to prepare and advertise a budget if they know that it is inadequate. Further, it is required that the budget be made available for public inspection at least twenty days prior to its adoption.

Through the use of the PEF, appellant avoided the requirements of 16 P.S. §4951 which requires that the Controller pass upon the debts, claims, or demands of

[8] 16 P.S. §4981. During the period of this surcharge from 1970 through 1979 the responsibilities of the Commissioners concerning the budget were established. 16 P.S. §4981.

the Coroner for additional salaries or other expenses. If appellant had followed the requirements of 16 P. S. §4952, the proposed expenditures of the Coroner's Office would have been brought to the attention of the Commissioners, for it is their obligation to draw warrants on the County treasury for payment of a debt, claim, or demand which has first been audited, and approved by the Controller.

The Code imposes an obligation upon the Controller to scrutinize, audit and decide on all bills, claims, and demands against the County. He is permitted to inquire and ascertain whether any officer or agent of the County is interested in the contract upon which any claim may arise, has received or is to receive any commission, consideration of gratuity related thereto. 16 P.S. §4950.

[9] If appellant had reported to appellee his desire to use monies for the payment of employees and other obligations, it would have required a majority of the Commissioners to approve the drawing of the warrant by the Treasurer, and countersigned by the Controller. 16 P.S. §4953. In this way the Commissioners would have known of the existence of the PEF and what it was being used for.

By appellant paying to certain Morgue employees that which he desired to as additional compensation from the PEF, he avoided the requirements of the Second Class County Code dealing with the fixing of compensation by all elected or appointed officers and employees. 16 P.S. §4820. In one instance, at least, appellant engaged an employee to work weekends, Dr. Davis who at that time

was not on the County payroll in any capacity. The number and compensation of all deputies, assistants, clerks and other personnel of County offices must be fixed by the Salary Board, and is to be paid out of the County Treasury. 16 P.S. §4823.

Nor can appellant claim that he did not have the right to be present and be heard concerning the salaries of his deputies and other employees for the Second Class County Code provides that he, as the head of the agency, had the right to be present and that a majority of the board's decision control. 16 P.S. §4825. Rather, appellant, after endeavoring to get the Salary Board to pay what he believed to be proper compensation, accepted that which the Salary Board established, [10] hired the employee or employees at a higher salary and paid the difference out of the PEF without advising appellee or the County Commissioners.

The difficulty with appellant's position that he is required to report only "public monies" is that by not reporting any monies, he establishes himself as judge and jury as to what his obligation to report is and what should properly be paid into the coffers of the Allegheny County. The Second Class County Code makes specific provision to avoid this very occurrence.

16 P.S. §4802(a) provides that,

> "Each of said officer shall keep a separate account book, the form of which shall be prescribed by the controller, in which entry shall be made of *all the moneys* received for fees and of all moneys earned and chargeable upon the county, specifying the day

> and date, the title of the case, if any, for what service, and from whom received." [Emphasis added].

The billing for "nonjurisdictional services" was in the name of the Coroner, Dr. Cyril Wecht, upon the Coroner's County of Allegheny stationery. The checks were normally returned made payable to Cyril Wecht, Coroner, but on some occasions to the County of Allegheny. In all instances they were deposited in the accounts of Cyril H. Wecht, later referred to as the PEF.

Appellant wishes to avoid the holding of the Commonwealth Court in this very case, *In Re: Controller's Subpoena Concerning* [11] *Professional Education Fund of Allegheny County Coroner's Office*, 62 Pa. Commw. Ct. 58, 434 A.2d. 1323 (1981). There, at page 1325, it is held,

> "Although the Coroner's Office may have no legal obligation to render services to outside entities, the services were performed under the auspices of the Allegheny County Coroner's office. The record reveals that county facilities were utilized to perform the post-mortem procedures. Since the activities in question were closely associated with the Coroner's office as an official County office, we conclude that the services were performed in the Coroners' official capacity, that the Coroners were obligated to report receipt of funds to the county through the Controller, and that the surcharges filed by the Controller are the proper avenue for relief."

It is argued by appellant that this is dicta, therefore, of no moment. We disagree. In order to resolve the issue of whether or not the surcharges were barred by the statute of limitations, it was necessary for the Commonwealth Court, as a prerequisite, to determine in what capacity the Coroner was acting at the time the services were rendered. The Commonwealth Court concluded that the services were performed under the auspices of the County Coroner's Office, that County facilities were utilized to perform the work, and that the work was closely associated with the Coroner's Office. The Commonwealth Court held that the work was performed in the Coroner's official capacity. It is true that upon the request of the Coroner's attorney, the Commonwealth Court subsequently entered an Order stating, "Nothing in this Opinion and Order filed September 25, 1981, shall prevent [12] former Coroners Hunt, Stalter and Wecht from raising a defense at trial, that the activities at issue were performed in a non-official capacity." Appellant was given every opportunity to, and did, present a full defense at trial.[9] This, however,

[9] By an Order of this Court, through Papadakos, J., it was determined that the burden of proof was upon appellee. The undersigned concluded that, due to his appointment giving him the authority as any Judge presiding in the 5th Judicial District, he was bound by that decision concerning burden of proof. Both parties were concerned during the course of the trial as to the burden of proof, and both presented the case as if they had the burden of proof.

In *In Re: Washington County Controller's Report for 1964*, 427 Pa. 631, 235 A.2d. 592 (1967), it was held that the burden of proof on appeal from a surcharge is on the surcharged officer to show that he is guilty of no misconduct. Similarly, in *In Re: Annual Audit and*

(Footnote continued on following page.)

does not in any way impair the import and significance of the decision. As this Court understood the addendum of November 17, 1981, by the Commonwealth Court, it was to fully hear the contentions of the appellant and not necessarily prejudge the matter because of the Commonwealth Court's decision. This Court did exactly that. Although appellant contends that the PEF did not provide him with any money personally, it must be acknowledged that numerous checks were made payable to him for travel, entertainment, membership [13] in scores of organizations, meetings and other similar activities.

The law is clear that a public officer cannot receive compensation in addition to that authorized by statute. *Snyder vs. Naef*, 36 Pa. Commw. Ct. 39, 389 A.2d. 212 (1978). Surcharges were sustained in *In Re: Appeals of Lackawanna County*, 296 Pa. 271, 145 A. 843 (1929), where the County Treasurer attempted to retain interest received from bank accounts in which County money had been deposited and in certain fees that had been paid

(Footnote continued from preceding page.)

Financial Report of Auditors of Borough of Upland for Calendar Year 1973, 36 Pa. Commw. Ct. 538, 389 A.2d. 229 (1978), the burden was placed on the surcharged official to explain the expenditure. In *In Re: West Hazelton Borough Auditor's Report*, 75 D. & C. 200 (1951), the burden was placed upon the officers attempting to avoid the surcharge.

Finally, in *In Re: Appeal from Controller's Report, Olyphant School District*, 61 Lack. Jur. 197 (1960) it was held, at page 200, "While it is not clear from the cases on whom the burden of proof rests in the issue of loss . . . no surcharge can be imposed . . . unless the record discloses an actual loss. . . ."

over to him, and *Pittsburgh vs. Anderson*, 194 Pa. 172, 44 A. 1092 (1899), where the Treasurer of Allegheny County attempted to keep fees, for services performed in the issuance of liquor licenses, which were to have been collected and paid over to the City of Pittsburgh.

In *Clark vs. Meehan*, 367 Pa. 166, 80 A.2d. 64 (1951), the Sheriff refused to account for monies collected from litigants in civil cases claiming they were for mileage, notary fees, deposits covering costs of judgments, sales and other similar items. It was the Sheriff's contention that these monies were properly paid over to process servers, notary publics, and other similar persons to cover necessary expenses. The Sheriff further claimed that any overplus was not to be returned to the County, but, rather, to the litigants and that the Controller neither had the power nor the duty to audit the accounts. Under the Act of March 31, 1876, P. L. 13, §10 [16 P.S. §2239], a statute similar [14] to the statute in this case, the Court held that whether or not the Sheriff was correct in his assertion that there were no errors or irregularities, he was wrong in not permitting the Controller, who had the duty by law, to determine that issue officially. Without the records, to which the defendant objected, the Controller could not make that determination. The Court concluded, therefore, that the writ of mandamus was sustained and the Sheriff was required to furnish the information desired. Similarly, in *In Re: Appeals of Lackawanna County, supra*, where it was claimed that it was the custom in the County not to pay the interest from accounts in the Treasurer's Office

through the County Commissioners, a finding that the Treasurer did not conceal this fact caused the Supreme Court to hold that was of no moment.

Further, at page 845, the Court stated,

> "The treasurer should have specified in them all the money received, and, if he believed any of it belonged to him, should have claimed credit for its retention. His right thereto could then have been passed on by the controller, and on appeal from his report, if any was taken."

The appellant endeavors to escape the requirements and the entire scheme of accountability as contained in the requirements of the Second Class County Code by relying on *County Auditors of McKean County vs. Anderson*, 133 Pa. Super. Ct. 475, 3 A.2d. 28 (1938). His reliance is misplaced. There, an effort was made to surcharge the County Recorder for the use of his office in the preparation of legal abstracts [15] of title for which the interested parties paid him a fee. Testimony was that the work was done by the Recorder and his chief deputy. His abstracts, however, did not bear his certificate as Recorder of Deeds, nor his official seal. Further, his office was required by law to be open to any member of the public who desired to use it. The Superior Court was required to pass upon Article XIV, Section 5, of the Pennsylvania Constitution requiring that all compensation of county officers shall be regulated by law and that all fees which salaried county officers might receive must be paid into the County Treasury, as directed by law. In addition, it was necessary for the Court to construe the Act of March 31, 1876 (P.L. 13;

Pa. St. 1920, §§10807, 6488 [16 P.S. §2231 *et seq.*]), which directed that all sums received should be paid to the respective county, and that no officer shall receive for his own use, any fees for any *official services* whatsoever. (Emphasis added.) The Court ruled in favor of the Recorder.

Contrary to the Recorder's Office, the Coroner is, by statute, required to be the determinor of who is authorized by written consent or who is admitted in the Coroner's presence to examine or inspect a body in the Morgue. Nor can any body be removed from the Morgue except upon certificate of the Coroner. 16 P.S. §4233.

It is the Coroner of Allegheny County that has the obligation to view a body and investigate the facts and the circumstances concerning a death which may have occurred within the county. 16 P. S. §4236.

[16] It is the Coroner that determines whether the death resulted from natural causes or by suicide and whether an inquest is required. 16 P. S. §4237.

The appellant in any event contends that Dr. Winek and the Toxicology Laboratory is not part of the responsibility of the Coroner's Office, and therefore, monies derived through the Toxicology Laboratory should not be subject to surcharge. It is true that in *Perper vs. Hunt et al., supra,* it was held that the Coroner has no statutory right to maintain the Toxicology Laboratory independent of the control of the County Commissioners. However, it was determined, in that case that the Coroner could not expand his facilities and embrace duties not specifically authorized by statute

without the express approval of the Board of the County Commissioners. Further, examination of the Exhibits, and in particular, appellee's Exhibit 5, shows numerous cancelled checks and billing statements for out-of-county toxicology work done for out-of-county hospitals, all appearing to be made payable to Dr. Wecht and deposited by Dr. Wecht in the Mellon Bank accounts in his name. Therefore, the work of the Toxicology Laboratory fell squarely within the same practice that was followed by the Coroner's Office for out-of-county autopsies and other related services, and, in fact, the Toxicology Laboratory is nothing more than a related service of the Coroner's Office.

[17] II. DID THE COURT ERR IN ACCEPTING THE CONTROLLER'S FINDINGS OF FACT 20, 21, and 22 DEALING WITH APPELLEE'S EXHIBIT 22 BEING A LIST OF RECEIPTS OF MONIES BY THE APPELLANT FOR OUT-OF-COUNTY AUTOPSY SERVICES DURING THE YEAR OF 1973 WHICH MONIES MADE UP A PORTION OF THE "PROFESSIONAL EDUCATION FUND?"

Findings of Fact 20 and 21 as submitted by appellee are based on the receipt in evidence of appellee's Exhibit 22. That Exhibit is a listing of the dates and amounts of checks received by the Coroner's Office for out-of-county autopsies of persons, listed by name, the charge made

and the service rendered for the year of 1973. From this Exhibit it is claimed that $10,780.00 was received and is included in the surcharge.[10]

Exhibit 22 is a "spreadsheet" of receipts for out-of-county services performed in 1973. It shows the date of the checks, the name of the person who is the subject of the autopsy, the amount of the check, the type of service rendered, and the county from which the monies came. This Exhibit was not introduced until April 14, 1983, although it was the subject of examination as early as the first day of the trial. The witness who qualified the Exhibit and testified [18] as to the method of its preparation was the same throughout, Robert John Lentz, an Audit Supervisor in the Allegheny County Controller's Office. Lentz was in charge of the team that traveled to the various counties and secured from them photocopies of both sides of the checks and the invoices which are reflected on Exhibit 22. Lentz developed a spreadsheet as the information was returned to him by his investigators. Neither the checks, invoices or reports are in evidence. Lentz testified as to how the spreadsheets were tested. He used subpoenas to obtain paid up bills from the various makers of the checks. He also received bank statements, cancelled checks, and checkstubs. He did not have the "Log Book" for 1970-73 to check names of decedents brought into the Allegheny County Morgue.

[10] A subsequent review of the record by the Court revealed that during the trial, appellee's counsel withdrew $250.00 from the total amount reflected in the Exhibit. However, because the entire $10,780.00 was computed in the Verdict of this Court, that is the amount which the Court has withdrawn from the surcharge due to a lack of evidence.

He also, on some occasions, had no breakdown of deposits in defendant's Mellon account. He reviewed all of the documents personally.

Exhibit 22 is based on paid up bills received by the Controller's Office pursuant to subpoenas. The bills were tested as to their amount by the checks and invoices that were obtained from the other counties. The invoices were cross-referenced against the available records that the Controller had obtained from the out-of-county controllers. All of these records which were available were in the Courtroom for appellant and his counsel to inspect with the exceptions of the paid up invoices the Coroner's Office previously had sent him. For the 1973 spreadsheet, appellee had an [19] itemized listing by date. An attempt was made to trace the total of monies received into bank accounts of the appellant. As the auditors would return the out-of-county material to the witness, they would submit memos concerning what they had found. None of the investigators testified, nor were any of the memos placed in evidence.

Finally, appellee moved the introduction of Exhibit 22 to which objection was made. The objection was overruled and the Exhibit admitted. We conclude this to be error.

There are three possible theories under which support for the testimony of the witness, Lentz, and Exhibit 22 can be attempted. They are: (1) Uniform Business Records as Evidence Act;[11] (2) Proof of Official Records Act;[12] or (3) a statement of assertion prepared by a public

[11] Act of 1976, July 9, P. L. 586, No. 142, §2 [42 Pa. C.S.A. §6108].

[12] Act of 1976, July 9, P. L. 586, No. 142, §2 [42 Pa. C.S.A. §6103].

officer pursuant to a public duty exception to the hearsay rule as described in *Wigmore on Evidence*, Volume V, §1630 et seq. (1974).

The requirements of the Uniform Business Records as Evidence Act, *supra*, are inter alia, that a custodian or otherwise qualified witness testifies to the identity of document and the mode of its preparation. It must, of course, be made in the normal course of business. There is a requirement that the person who made the report must do so as a part [20] of his required duties. *Githens, Rexsamer & Co., Inc. vs. Wildstein*, 428 Pa. 201, 236 A.2d. 792 (1968). If evidence to show the identity and mode of the preparation of a document and that it was made in the regular course of business at or near the time of the event is lacking, it is not admissible under the Uniform Business Records as Evidence Act. *Commonwealth vs. Perdok*, 411 Pa. 301, 192 A.2d. 221 (1963). If an expert report is prepared for the purpose of pending litigation, it can never be in the regular course of business. *Pompa vs. Hojnacki*, 445 Pa. 42, 281 A.2d. 886 (1971). There was no testimony as to the mode of preparation of the statements of the investigators which were submitted to the witness Lentz. Nor is there any testimony as to exactly what the investigators did when they went to the respective counties to attempt to determine which cases would properly be the subject of the surcharge. Counsel for appellant was given no opportunity to cross-examine the maker of the statements. WHEREFORE, the Business Records Act could not be applicable.

Nor can the statements fall within the exception to the hearsay rule provided under the Proof of Official Records Act, *supra*. By this statute, an official record kept within the Commonwealth by any governmental unit and proven by the officer having legal custody of the record or his deputy accompanied by a certificate that the officer had custody under the seal of the office from which it came, may be admitted into evidence. There was no effort to comply with [21] this statute. We cannot say that a report of an investigator submitted to the Controller's Office, even if it had been offered into evidence, would come within this exception. The resolution of the offer would depend on the facts produced. Without either the reports or the evidence the offer would have been refused.

The third exception to the hearsay rule is that of testimonial assertions prepared by a public officer pursuant to an official duty, *supra*. This exception appears both in the civil and criminal law. In *Githens, Rexsamer & Co., Inc. vs. Wildstein, supra*, when an electrical inspector of the city's Department of Licenses and Inspections who had been called in by a fire marshall died prior to trial, an effort was made to have the report admitted at trial for it contained various statements essential to the party introducing it. The trial judge admitted it, but the court en banc reversed. This reversal was sustained on appeal.

In the case at bar there was no effort to show the investigator was not in fact available to be confronted on cross-examination. In that sense the case is analogous to *Galloway vs. Brewer*, 525 F.2d 369 (8th Cir. 1975), cert.

denied 424 U. S. 974 (1976), where the defendant and the prosecution in a state court entered into a stipulation concerning the testimony of a polygraph operator. The State Supreme Court had ordered that the testimony be specifically [22] limited to the opinion of the operator as to the truthfulness of the defendant in answering some basic questions. This was held to be a deprivation of the defendant's right of confrontation in that he was not permitted to probe into procedures used by the operators. Similarly, in the instant case, the denial to appellant of the opportunity to confront the investigators as to exactly how they went about their duties denied appellant the opportunity to examine them as to what they were informed to do and how they went about performing those duties.

HENCE, the appellant's exception is sustained and the surcharge will reflect a reduction of $10,780.00.[13]

III. DID THE COURT PROPERLY SURCHARGE THE APPELLANT, DR. WECHT, FOR SERVICES PERFORMED BY THE ALLEGHENY COUNTY CORONER'S OFFICE FOR HIS PRIVATE LABORATORY KNOWN AS PITTSBURGH PATHOLOGY & TOXICOLOGY LABORATORY?

Among the many activities of appellant during the period of surcharge was that of his ownership and active management of an independent testing laboratory, PP&TL. PP&TL was initially formed in 1964 and was owned and continuously operated by the appellant until its sale in 1978. Originally, it was located at 220 Meyran Avenue, and later at 3600 Forbes Avenue, both in the

[13] *See* Footnote 10.

Oakland section of the city. A branch was established at the Highland Building in the East Liberty section of Pittsburgh and a second branch in Monroeville, [23] a suburb of Pittsburgh.

PP&TL was designed to provide services in anatomic pathology, clinical pathology, forensic pathology, forensic toxicology and immunology. Preparation of the slides as involved in this case is known as histology. Although the laboratory initially had an employee trained and competent to do histology, the employee left the service of the company in 1968. When she left she took with her the equipment which belonged to her. The lab was then without the necessary equipment to perform the histology work. At about that time appellant elected to transfer the histology work of his lab to the Allegheny County Coroner's Office. There was no request for permission made to the County Commissioners, nor was any effort made to inform them of this activity. Although appellant claims that this was done basically for the purpose of educating and training the personnel at the Coroner's Office, and in particular, the residents, it is the conclusion of the Court that whatever benefit may have been received by the latter was incidental to the business operation.

In the proposal for the residency program submitted to the Governor's Justice Commission, appellant indicated that there would be "weekly slide sessions with unknown slides prepared from within the office and submitted from outside sources."[14] The slides came from several

[14] Trial Transcript Volume 6, page 168.

sources [24] including West Allegheny Hospital, Doctors Hospital (subsequently known as Podiatry Hospital), and private physicians. According to Exhibit 65 the monies received from Podiatry Hospital between June 1974 and January 1979 for surgical slides was $94,306.25. That received from West Allegheny between 1974 and 1976 was in the amount of $13,500.00. Some of the slides were known as surgical or live slides taken from a patient perhaps during the course of an operation requiring an immediate reading and analyzation. The reasons given by the appellant for having the slides done at the Coroner's Office lab included educating the Morgue personnel and saving appellant the time it would take to go from the Coroner's Office to PP&TL. Certainly the adage "time is money" applies in this case.

In addition to being Coroner, appellant had a private office for medical-legal consultations and was the Chief of Pathology at Central Medical Pavilion. He was not required to spend any particular number of minutes or hours per day at the Coroner's Office. However, the less time that he could spend at the Coroner's Office, the more he could spend at other endeavors. Therefore, it is not unreasonable to conclude that it was to his economic advantage to have the slides brought to the Coroner's Office where he could examine them or have competent personnel do it for him.

Lois Warren, PP&TL's Forbes Avenue office secretary, testified that the billing for histological testing was $10.00, while microscopic testing was $15.00, and frozen [25] sections were $25.00. All of this money went into the PP&TL account. Therefore, in the assessment of the

surcharge, although the surcharge as filed for PP&TL services was in the amount of $118,305.23, this Court assessed a surcharge for these services of $58,954.00. This was computed by taking the gross tissues tested during the surcharge period, 8,125, and multiplying that by $2.00 per test which was one-fifth of the total charge to the patient, as repayment to Allegheny County for a total of $16,450.00. For 6,240 micro tissues tested at $5.00 per micro, an assessment of $31,200.00 was made, and for a substitute pathologist to read the slides on twenty days per year when Dr. Wecht was on vacation or absent at $8.00 per gross and $10.00 per micro, an assessment of $10,704.00 was made. Appellant acknowledges in his brief at page 46, that $7.00 is "more within reason." In addition, an assessment for frozen sections of $600.00 makes the total surcharge for PP&TL services $58,954.00. In consideration of the admitted fact by appellant that approximately 10% of the histologist's day was spent on the preparation of surgical specimens for out-of-county and private autopsies and surgicals for PP&TL or between one-half hour and one hour, it would appear that the charges made by this Court are most modest.

Section 1806 of the County Code [16 P.S. §1806] provides that, "No elected or appointed county officer shall be in any wise, either directly or indirectly, personally interested [26] in any contract to which the county is a party. . . ." See *Kimball vs. Cambria County*, 36 D. & C. 2d. 662 (1965). If appellant had revealed to the County Commissioners that the Coroner's Office was performing services for his private laboratory, and that

no compensation was being paid to the County, there is little doubt that the Commissioners would have been obligated to order him to refrain from such conduct. If the Coroner had then proposed compensation to the County through an oral or written contract for the use of the services of the County or its personnel, he would have been confronted with this statute which would have been an absolute prohibition to such a contract. Therefore, we conclude that appellant could not legally perform PP&TL work in the Coroner's Office.

We, therefore, conclude that the surcharge was proper as to Pittsburgh Pathology & Toxicology Laboratory.

IV. DID THE COURT ERR IN SURCHARGING DR. WECHT $3,600.00 FOR THE PERFORMANCE OF 72 PRIVATE AUTOPSIES PERFORMED AT ACCO AT $50.00 PER AUTOPSY?

Appellant contends, and this Court agrees, that the performance of autopsies on his private cases at the Allegheny County Morgue was in a private capacity, and not as Coroner. As such, however, he had no greater rights to the use of the Morgue than any other person. Therefore, it is only right that he be charged a reasonable fee for the use of the facilities at the Morgue.

[27] By stipulation of the parties, 72 private autopsies were performed at the Morgue during the period of the surcharge. When spread over a nine-year period, on average eight such autopsies were performed per year. From the appellant's Exhibit KKK and the testimony of appellant's witness, James Bentz, it appears that the first floor area of ACCO measures 5,000 square feet and

that the fair rental value of such space is $6.05 per square foot, or $30,250.00 per year. Appellant then calculates the cost for the year for the use of these facilities for eight cases as compared to 1,800 bodies taken to ACCO to be $133.10. In his brief appellant multiplies $133.10 by 10 years and arrives at a "maximum financial loss to the County of $1,331.00."[15] The fallacy in the mathematics is that by the testimony of Dr. Wecht, he admitted that there are approximately 2,500 bodies brought into the Morgue per year. Of this, slightly over 50% were "subject to an autopsy." The spread over the years percentage-wise, according to Dr. Wecht, is 40-60%. Therefore, when considering the total useable space for autopsies, the figures should actually be closer to 1,000 than 1,800. If the figure of 1,000 is used, the rental per body for floor space is $30.25, and per year for eight cases is $242.03. In nine years it is $2,178.27 instead of $1,330.00 for ten years as argued by the appellant.

However, there is much more in determining rental [28] of a space for an autopsy than merely floor space. There is the use of the facilities. Although the testimony indicated that there is very little wear and tear, that is normally to the advantage of the landlord. A charge of $50.00 per autopsy is most modest in this Court's opinion, and we see no error.

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[15] Appellant Brief in Support of Exceptions, page 53.

V. DID THE COURT ERR IN PERMITTING A DETERMINATION OF THE ACTUAL LOSS FOLLOWING A CONCLUSION OF NO FRAUD OR COLLUSION?

Appellee excepted to the Court's conclusion that the Act of 1945, May 15, P. L. 538, Nos. 210, 538, §§1, 2 [65 P.S. §§191, 192] applied to this case. By that statute, now repealed, once it was determined that there was no fraud or collusion, the Court was required to take into consideration the results of procedure followed by appellant as if it had been "strictly according to law." Appellee at trial, by exception and in his brief contended that appellant did not comply with this statute because that which he did was not authorized by law, and therefore, could not be done "strictly according to law" as required by the statute.

A review of the cases, as noted in the initial Opinion of this Court, demonstrates that in all cases decided under [29] the statute, where the Act of 1945 [65 P.S. §§191, 192] was held to apply, there was some legal authority for that attempted by the officeholder.[16]

[16] In *Davis vs. Carbon County*, 369 Pa. 322, 85 A.2d. 862 (1952), the County Commissioners failed to secure approval from the State Art Commission and the judges of the Court of Common Pleas for the construction of a warehouse. In that there was authority to build the warehouse provided that approval was secured through the required procedures, and there was no fraud or financial loss, there was no surcharge imposed. In *In Appeal of Yenerall*, 165 Pa. Super. Ct. 144, 67 A.2d. 565 (1948), a township supervisor was surcharged for what was claimed to be an unlawful interest by him in a contract between his son-in-law and the township relating to the maintenance of township roads. Although the Act of 1945 [65 P.S. §191] was repealed

(Footnote continued on following page.)

[30] This Court has re-examined its previous position as to whether appellant can successfully defend the Lynch Surcharge by applying the Act of 1945 [65 P.S. §§191,

(Footnote continued from preceding page.)

as it applied to townships of the second class by the The Second Class Township Code [53 P.S. §19093-2201], it was in force at the time of the case. The court found no financial loss for there was no evidence that the work was not performed at a rate that was not customary, nor was there fraud or collusion. The contract with the son-in-law of the supervisors was such that the township supervisors were entitled to enter into. In *In Re: Appeal from Controller's Report of Olyphant School District*, 61 Lack. Jur. 197 (1960), the school directors were surcharged for expenditures made for printing, the purchase of supplies and equipment, supplies, painting of classrooms and payments to school directors for expenses incurred in attending a convention. The directors had authority to make the desired appropriations. They were not surcharged for entering into contracts for the painting of classrooms without securing sealed bids in accordance with the law. They were, however, surcharged for payment to themselves of expenses in attending a convention which caused a clear financial loss flowing from the directors non-compliance with the law. In *In Re: West Salem Township Auditors' Report*, 62 D. & C. 253 (1947), the issue was whether the school board properly paid a substitute collector of taxes 10% instead of 5%. It was concluded that under the Act of 1945 [65 P.S. §191] and the Act of 1931, the board could pay the increased expenditure. In *In Re: West Hazelton Borough Auditors' Report*, 75 D. & C. 200 (1950), councilmen were initially surcharged for a $1,500.00 overexpenditure and a failure to establish that the sinking fund had been invested to collect interest. However, on rehearing, it was proved that expenditures were actually made and that they had in fact collected interest, so there was no financial loss and the surcharge was dismissed. In *Auditors' Report of Somerset Township School District vs. Coleman, et al.*, 14 Som. 18 (1948), there were small payments made to the school directors' children for work done for the school district. It was found that there was no fraud or collusion, loss or damage and the surcharge was dismissed. Finally, in *In Re: Audit of*

(Footnote continued on following page.)

192] in light of the statutory and constitutional obligation of appellant to have reported and turned over the monies involved in this case to the County of Allegheny.[17]

(Footnote continued from preceding page.)

School District of City of Scranton (No. 1), 354 Pa. 225, 47 A.2d. 288 (1946), the Act of 1945 was held not to be applicable because it was enacted after the acts giving rise to the surcharge had been committed. However, the Act was used by reference. The Act of 1931, which was similar in nature to the Act of 1945, was applied. The Court held that even though the School Board used School District employees and purchased material piecemeal, all but one order being less than the $300.00, there was no evidence of personal gain, favoritism, or financial loss to the School District. The Court placed the burden of proof on the school directors; a burden the Court concluded was met, and therefore, it denied the surcharge. There was legal authority for the school directors to build a grandstand and athletic park.

[17] This issue is limited to the Lynch Surcharge as the Act of 1945 [65 P.S. §§191, 192] was repealed by the Act of 1978, Nov. 26, P. L. 1399, No. 330, §802 effective 60 days after November 26, 1978; January 25, 1979. The Lucchino Surcharge runs from February 5, 1979, to July 18, 1979. By virtue of the Act of 1978, Oct. 4, P. L. 883, No. 170, §1 [65 P.S. §401], the legislature enacted a new statute dealing with conflict of interest. It provided, "No public official . . . shall use his public office . . . to obtain financial gain other than compensation provided by law for himself, a member of his immediate family, or a business with which he is associated." This statute controls the Lucchino Surcharge and prevents appellant from raising the defense of benefit to the County. Although it could be argued that because of the enactment of 65 P.S. §401 the Act of 1945 [65 P.S. §§191, 192] is inapplicable to the Lynch Surcharge, we conclude to the contrary based on the authority of *Klug vs. Gazey*, 270 Pa. Super. Ct. 445, 411 A.2d 802 (1979) and *Commonwealth, etc. vs. Pa. Engineering Corp.*, 54 Pa. Commw. Ct. 376, 421 A.2d. 521 (1980).

[31] The Pennsylvania Constitution, art. IX, §4 provides in Paragraph 3 that "Fees incidental to the conduct of any county office shall be payable directly to the county. . . ." Article IX, §4 was added by the 1968 Constitutional Amendment. There was no equivalent section in the Pennsylvania Constitution prior to 1968. Pa. Const., art. IX, §4, Historical Note. It became effective immediately on approval by the electorate, April 23, 1968. Pa. Const. art. IX, Schedule. *Hempfield Township Appeal (No. 1)*, 217 Pa. Super. Ct. 439, 272 A.2d. 729 (1970).[18]

In addition, 16 P. S. §11011-12 restricts payments to county officers. They were to be paid only the salaries provided in the Act of 1971 [16 P.S. §11011-1 et seq.] for services performed for the county and all fees and commissions received in the conduct of any county office were to be paid directly to the county. 16 P.S. §11011-9 contains [32] a schedule of salaries for coroners dependent upon the class of county in which the coroner is serving.

[18] Although county officials are listed in art. IX, §4 of the Constitution, Coroners are not included. Article IX, §4, does, however, provide that in addition to the county officer listed, there are to be included ". . . such others as may from time to time be provided by law." *Commonwealth ex rel. Foreman vs. Hampson*, 393 Pa. 467, 143 A.2d. 369 (1958). *See also* PLE, Coroners, §1.

Coroners became county officers by the Acts of 1955, August 9, P. L. 323, §401; as amended, 1968, Nov. 26, P. L. 1099, No. 341, §1 [16 P.S. §401] and 1953, July 28, P. L. 723, art. IV, §401; as amended, 1968, Nov. 27, P. L. 1114, No. 346, §1 [16 P.S. §3401]. By virtue of the Act of 1971, Nov. 1, P. L. 495, No. 133, §10.1, added 1979, Nov 1, P. L. 246, No. 82, §2 [16 P.S. §11011-10.1] county commissioners were given the power to fix the salaries of county officers. The Act was effective immediately and was applicable to each officer when permitted by the Pennsylvania Constitution. Coroners were included. The coroner is regarded as a county officer in *Bakes vs. Snyder*, 486 Pa. 80, 402 A.2d. 1307 (1979).

In *Simon vs. County of Allegheny*, 87 P. L. J. 317 (1939), affirmed 337 Pa. 436, 11 A.2d. 868 (1940) it was held that salaries can be legally set and changed only by compliance with the statute concerning salaries.

Appellant had a monthly duty to pay over all monies earned by his office. 16 P.S. §4802. Indeed, appellant and every county officer must declare as a part of his oath upon taking office that he will not knowingly receive, directly or indirectly, any monies or other valuable things for the performance or non-performance of any of the acts or duties pertaining to the office other than that allowed by law. 16 P. S. §3403.[19]

Nor may a public official claim additional compensation for discharge of duties although those duties are increased without a corresponding increase in salary or fees payable to the county officer. *Lawson vs. Allegheny County*, 326 Pa. 242, 191 A. 600 (1937). There can be no question that the monies received by appellant were in the nature of a fee. A fee has been defined as compensation for services [33] rendered, especially professional services. *City of York vs. Reihart*, 475 Pa. 151, 379 A.2d. 1328 (1977). Nor can a Court of Common Pleas order the County Controller to pay additional compensation to an employee of the county or anyone else for services to the county, for the power as to hiring

[19] Our courts have held that if a county official receives a salary in good faith, based on a statute which is subsequently declared unconstitutional, the monies must be paid back for there is no inherent right to keep additional compensation as such an officer is entitled only to the salary expressly authorized by the statute. *County of Allegheny vs. Grier*, 179 Pa. 639, 36 A. 353 (1897).

and salary is vested in the county executive and administrative offices. *In Re: Montogomery*, 67 Pa. Commw. Ct. 2, 445 A.2d. 873 (1982).

Monies may be properly appropriated and lawfully spent only upon due appropriation through proper action of the fiscal offices of the county or under appropriate enabling legislation. *Bricker vs. Krupp*, 9 Bucks 251 (1960). Even though work was done outside of office hours, that will not ordinarily justify with extra pay even though the employee's superiors and the County Commissioners knew the work was being done. *Lawson vs. Allegheny County, supra.*

After a careful reappraisal of our previous ruling that the Act of 1945 [65 P.S. §§191, 192] could be applied to monies received into the PEF to determine whether there was any loss to the county, we have determined that ruling to be in error. We accept the position of appellee that there was no authorization for the expenditures of appellant without approval of the County Commissioners and/or the Salary Board. Concluding that the monies received from out-of-county services by the Coroner's office are "fees incidental to the conduct of that office, appellant was [34] obligated by the requirements of the Constitution [art. IV, §4] and by the Act of 1971 [16 P.S. 11011-12(b) to turn over such monies to the county. We conclude that appellant did not have the authority to decide where the monies should be spent. To allow appellant to make such a decision would be in conflict with the entire statutory concept of responsibility and accountability established by the legislature. To give a credit under the Act of 1945 [65 P.S. §§191, 192] is to approve an avoidance of the entire plan of County Government. This we cannot do.

VI. WAS THERE A BODY OF LAW IN PENNSYLVANIA BY JUDICIAL DECISION PRIOR TO THE ENACTMENT OF THE ACT OF 1945, MAY 15, P.L. 538, NO. 210, §1 and NO. 538, SUBSECTION 2 [65 P.S. §§191, 192] WHICH UPON ITS REPEAL PERMITS THE COURT TO CONSIDER THE ACTUAL FINANCIAL LOSS TO THE COUNTY OF THE APPELLANT'S CONDUCT?

In Pennsylvania, contrary to appellant's oral argument, prior to the Act of 1945 [16 P.S. §§191, 192] there was no body of case law which granted to an officeholder relief from a surcharge if he acted in good faith and the County received reasonable value for the illegal conduct. Rather, it is to the contrary. In *Likovich Appeal*, 347 Pa. 40, 31 A.2d. 543 (1943), surcharges against the president and borough secretary of the Borough of Rankin were affirmed. The Court held, at pages 43-43,

> "Much of appellants' argument is to appeal for relief on the ground that the alleged illegal payments were made through ignorance of the mandates of pertinent statutes and not with any fraudulent intent. Such an appeal is not new and has been rejected uniformly. [Citations omitted.] It is our duty to execute mandatory and constitutional enactments of the legislature regardless of the hardships of a particular case."

[35] Also, in *Kistler et al. vs. Carbon County et al.*, 154 Pa. Super. Ct. 299, 35 A.2d. 733 (1943), it was held that a county commissioner can be surcharged for expenditures in excess of an appropriation, even though the County actually received reasonable value for the outlay. Citing *Lower Nazareth Township Supervisors' Appeal*, 341 Pa. 171, 19 A.2d. 92 (1941). In *Susquehanna County Auditors' Report*, 118 Pa. Super. Ct. 47, 180 A. 148 (1935), it was held that even though there was no fraud when the commissioners lumped together expenses and could not itemize them in their books, memorandum or other credible sources, the commissioners must be surcharged. Therefore, there is no body of law on which appellant can rely, upon the repeal of the Act of 1945, *supra.*

VII. DID THE COURT PROPERLY REFUSE TO GRANT CREDIT AGAINST THE 1979 SURCHARGE FOR BENEFITS RECEIVED BY THE COUNTY?

Appellant's basic argument is that even though the Act of 1945 [65 P.S. §§191, 192], which requires the Court to determine the financial loss of the County, was repealed by the act of 1978, effective January 25, 1979, and all of the monies which are the subject of the Lucchino Surcharge were accumulated subsequent to the repeal date, the Court is in error "as a matter of law" in not applying "unjust enrichment." We have previously concluded in Point VI that there was no body of law in Pennsylvania created by judicial decision prior to the enactment of the Act of 1945, *supra*, [36] which would

permit a court after its repeal to consider the actual financial loss of the County caused by the appellant's acts. Rather, appellant in this contention claims "unjust enrichment." Appellant cites *Audit Report of Township of Bristol, 1967*, 57 D. & C. 2d. 18, 28 (1972), for the proposition that a surcharge in Pennsylvania is compensatory and non-punitive. This case, however, was decided under the Act of 1945 [65 P.S. §§191, 192] and, therefore, had the benefit of the compensatory concept of the Act of 1945. The same is true of *Davis vs. Carbon County, supra*, and *Appeal of Yenerall, supra*. The appellant cited no case where unjust enrichment was held against a governmental unit. Rather, he cited *Zvonik vs. Zvonik*, 291 Pa. Super. Ct. 309, 435 A.2d. 1236 (1981), which involved a family dispute. There, the son had agreed to care for his mother and had expended monies on the mother's home based on the representation by his mother that if he moved into the premises and cared for her, the mother would convey the home to him. However, the mother then conveyed the premises by deed to her daughter-in-law. It was held that there had been unjust enrichment.

As held in *Samuel vs. University of Pittsburgh et al.*, 375 F. Supp. 1119 (W.D. Pa. 1974), appeal dismissed 506 F.2d. 355 (3d Cir. 1974) restitutionary relief will not be granted unless the defendant has wrongfully secured a benefit which it would be unconscionable for him to retain. There is not a scintilla of evidence in this case that [37] the County of Allegheny wrongfully secured benefits from appellant. Further, it must be shown that a person received a benefit from another and that it would be unconscionable for the recipient to retain that benefit

for unjust enrichment to be applicable. *Myers-Macomber Engineers vs. M.L.W. Construction Corp. and H.N.C.*, 271 Pa. Super. Ct. 484, 414 A.2d. 357 (1979).

The closest analogous situation which this Court could find is *In Re: Appeal of Sykesville Borough*, 91 Pa. Super. Ct. 335 (1927). There, the school board appealed from an assessment by the auditors for failure to advertise for bids and without official action as required by the School Code. The school directors were permitted by the lower court to subrogate to the rights of the contractor and to enter judgment against the school district on a quantum merit theory for the value of the improvements and to setoff the judgment against the surcharge. This was held to be error and was reversed on appeal. WHEREFORE, we see no merit in this contention.

VIII. DID THE COURT ERR IN NOT GIVING CREDIT TO THE APPELLANT A SETOFF FOR ALLEGED BENEFITS FROM PP&TL, CENTRAL MEDICAL PAVILION OR DEFENDANT'S COLLEAGUES?

The Court has previously determined in Section V of this Opinion, that the Act of 1945 [65 P.S. §§191, 192] is inapplicable. In so holding, it has denied to appellant credit for monies expended from the PEF for supplementary [38] salaries to Chief Forensic Pathologist, Dr. Perper, and residents, as well as certain membership dues in medical organizations, trips for educational purposes in the United States, books, periodicals, supplies and equipment.

Appendix C—Opinion and Order En Banc of the Court of Common Pleas of Allegheny County.

At the outset of this case the Court informed counsel for appellant that there would be no allowance of setoff. Appellant's counsel on several occasions throughout the trial agreed with that position.

On February 1, 1980, this Court, through Papadakos, J., filed an Order that subsequent proceedings in the matter were to be governed by the rules of assumpsit and that the Audit Report filed by appellee was to be considered as the Complaint to which appellant was to file responsive pleadings as permitted by the Pennsylvania Rules of Civil Procedure. If the appellant desired to attempt to assert a setoff, he was required by Pa. R. C. P. 1031(a), to file it under the caption "counterclaim." To now claim credit for a setoff or counterclaim when there was no notice to appellee of such an assertion by the pleadings, and therefore, no opportunity to prepare to defend, is grossly unfair.

But in addition, the entire concept of a public officer being given credit for things which he or others for him voluntarily do which he claims are to the benefit of the County is in opposition to the statutory structure by which County government operates. Appellant desires a credit of $92,800.00 for 150 cases in which quantitative acid phosphatase [39] tests were run. Although such tests may have been of benefit to the County and its citizens, there was no request for approval of such tests made to the County Commissioners. Conceivably, the tests could have been performed for less than the $92,800.00 by some other lab. When the testimony unfolded, this Court pondered why, if these tests were of such value, the Allegheny County Crime Lab was not

requested to secure the necessary equipment and personnel to perform such tests in that they were already running qualitative acid phosphatase tests.

In addition, appellant desires a credit of $39,900.00 for the autopsies appellant performed, which saved the County from having to have a pathologist. Appellant attempted to support this by pointing out that prior to 1966, the coroners had never performed autopsies. One might think that appellant, as an outstanding forensic pathologist, would welcome the opportunity to continue to improve his skills by performing such autopsies as a part of his position as Coroner.

Also, appellant desires to receive a credit of $30,000.00 for testifying six times per year as County Coroner. However, the law makes a distinction between a witness called in a criminal prosecution on behalf of the government and one called in a civil action. The state or the United States may call upon her citizens to testify as experts in matters concerning the common good. *Yerko vs. Clearfield Bituminous* [40] *Coal Corporation*, 145 Pa. Super. Ct. 269, 277-278, 21 A.2d. 97 (1941).

Appellant desires credit of $56,000.00 for services rendered by his friends or professional acquaintances and for $7,867.00 for various tests that were performed free of charge by Central Medical Pavilion for ACCO. As held in *Perper vs. Hunt et al.*, 130 P.L.J. 418 (1982), the final determination must lie with the County Commissioners as to what County funds are to be expended. To permit an officeholder to incur obligations against the County of the nature attempted in this case is in complete violation of the legislative scheme established for attempting to

keep County finances manageable. By requiring appropriations and the submission of requests for payment, the Commissioners are able, along with the Controller and Treasurer, to have some idea of what a County officer is doing with public monies. It is true that all public officials and employees are subject to the laws establishing their position. They may not use their special power to further their own interests, for our government must be one of laws and not of men. *Cotlar vs. Warminster Township*, 8 Pa. Commw. Ct. 163, 302 A.2d. 859 (1973).

In addition to all else, the effort to setoff is contrary to our case law. In *Todd vs. Borough of Patterson*, 55 Pa. 496 (1867), it was held that a treasurer of a borough in settlement of his official account could not have a credit [41] for an individual claim against the borough. In *Commonwealth to use vs. United States Fidelity and Guaranty Company*, 15 D. & C. 344 (1930), it was held that the private claim of a public officer or of his estate cannot be setoff against a claim made upon him in his official capacity. WHEREFORE, it is clear that there is no basis for consideration of setoff in this case.

IX. DID THE COURT ERR IN ASSESSING INTEREST AGAINST THE CORONER FROM OCTOBER 29, 1979, TO THE DATE OF THE VERDICT UPON THE PRINCIPAL AMOUNT OF $129,363.37 FOUND TO BE OWING IN THE LYNCH SURCHARGE AND INTEREST FROM MAY 2, 1980, TO THE DATE OF THE VERDICT OF $2,403.29 UPON THE LUCCHINO SURCHARGE, $13,254.81?

Both appellee and appellant except to the assessment of interest, but for entirely different reasons. Appellant asserts that interest is improper, as a matter of law, in a surcharge action. He argues in the alternative, that because he contested the surcharge in good faith, because the original surcharge was vacated, and because he did not have the use or benefit of the funds from the time the surcharge was filed until the Verdict, interest should not be charged. Appellee claims that the trial court erred in its computation of interest and that it should have been commenced as of the date the funds should have been reported to the County by appellant.

Neither the former Controller, John P. Lynch, nor the present Controller, Frank J. Lucchino, asserted a claim for interest. The Lynch Surcharge is entirely silent on [42] the subject. The Lucchino Surcharge raises a claim against appellant for the monies which represent the amount of funds received by him, and not paid into Allegheny County from February 15, 1979, to July 18, 1979, in the amount of $13,254.81. It cannot be disputed

that interest is owing after verdict.[20] That which has been awarded is known as prejudgment interest.

Although there may be some divergence in the lower courts, as an incident of the debt itself, it should be paid even though a specific claim for interest has not been made. *Seaboard Const. Co. vs. Curtis*, 54 D. & C. 1 (1945).

There are several bases for the granting of interest in this case. The filing of the Controller's surcharge by statute has the effect of a judgment against the real estate of the officer who shall thereby appear to be indebted to the county. 16 P.S. §4930.[21]

Although both a Petition to Strike and a Petition to Open Judgment have been filed in this case, they have never been litigated. The judgment from when the Coroner's report was filed continues to exist. *Washington County* [43] *Controller's Case*, 427 Pa. 631, 235 A.2d. 592 (1967). In *In Re: Controller's Subpoena, etc.*, 62 Pa. Commw. Ct. 58, 434 A.2d. 1323 (1981), the Commonwealth Court had to consider the reason advanced by the lower court for denying leave to appellee to file a supplement to the 1979 Annual Report.

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[20] By the Act of 1976, July 9, P. L. 586, No. 142, § 2 [42 Pa. C.S.A. §8101], a judgment for a specific sum of money bears interest at the lawful rate from the date of the verdict or award, or from the date of judgment, if the judgment is not entered upon a verdict or award. This is substantially a reenactment of the Act of Nov. 27, 1700 [1 Sm.L. 7], §2 [12 P.S. §7.82] and act of April 6, 1959 (P.L. 381), §1 [12 P.S. §781].

[21] The Historical Note appearing in Purdon's states that this statute is similar to §1730 of the County Code. That section is the Act of 1955, Aug. 9, P. L. 323, §1730 [16 P.S. §1730].

The reason assigned by the lower court was that the surcharge was an automatic judgment against appellant's real estate, and therefore, an unreasonable hardship against him. The Commonwealth Court was not persuaded by this reasoning. It agreed that an automatic judgment was entered against appellant as provided by 16 P. S. §4930; however, it refused to conclude that this was too harsh a penalty to impose upon a County officer who allegedly violated his public trust.

Interest remains owing upon a judgment even if the judgment is opened, and the plaintiff recovers a lesser amount. In such event, the interest shall be allowed on the judgment as it was reduced from the date of its entry. *Hamilton vs. Eichelberger*, 61 D. & C. 2d. 788 (1973).[22]

[44] This Court through a pretrial order by Papadakos, J., directed that this matter should proceed as in assumpsit. Filing an appeal in a surcharge is the equivalent of opening a judgment for there is an obligation on the part of the court to hear the merits of the case. 16 P.S. §4932 requires the court to form the issues in all appeals from the reports of the county controller and to submit the same for determination to a jury.[23]

[22] In *Hamilton vs. Eichelberger, supra*, the Court cited as authority *Watson vs. McManus*, 223 Pa. 583, 588 (1909), that interest is a legal incident of every judgment; *Markofski vs. Yanks*, 297 Pa. 74, 78 (1929) that a lien of judgment is not affected by the fact that judgment is opened by the court; and *Sanctis vs. Lagerbusch*, 213 Pa. Super. Ct. 483, 488 (1968), where a levy is made, it is not affected by an order opening a judgment.

[23] This statute was brought to the attention of counsel by this Court upon its assignment and received a waiver by both parties to the requirement of a jury trial.

WHEREFORE, interest can be sustained from the dates of the filing of the surcharges on the theory that a judgment was obtained thereby which has not been stricken.

Interest assessed in this case may also be sustained through the Restatement of Restitution §§156, 157 (1937), which have been accepted by our Supreme Court in *Sack vs. Feinman*, 489 Pa. 152, 413 A.2d. 1059 (1980). Section 156 provides that, subject to the provisions of §157,

> "... a person who has a duty to pay interest upon such value from the time he committed a breach of duty in failing to make restitution if, and only if: (c) payment of interest is required to avoid injustice."

Section 157(1) provides that a person who is under a duty to another to make restitution of property received by him, is under a duty to account for the direct product and to pay compensation for the use of the subject matter [45] as will be just to both parties in view of the fault, if any, of either of them. Section 157(2) provides that this rule is applicable to actions brought solely to recover the income or value of the use of the subject matter, or interest upon the amount of its value. Where monies are "unjustly" withheld, interest is owing thereon. *Mauch vs. Pittsburgh Pension Board*, 383 Pa. 448, 119 A.2d. 193 (1958). Williston on Contracts, §1415 (3d Ed. 1968) also provides that,

> "Interest is allowed not simply when an express contract is broken but also where money is wrongfully withheld by the defendant and the

> plaintiff's right is based on quasi-contract, as for instance where money has been acquired or retained fraudulently. . . ."

Although this Court has not found that the monies were retained fraudulently, we have found that they had been retained illegally. It is sound policy, equally applicable in equity or at law, that one who retains money, after it is justly due and payable to another should pay interest for the detention. *Gold and Company, Inc. vs. Northeast Theater Corp.*, 281 Pa. Super. Ct. 69, 421 A.2d. 1151 (1980).

The third basis for the payment of interest is where there is a definite time fixed for the payment of monies and such monies are not in fact paid within that time. This Court has concluded that there was a definite obligation on appellant to pay the monies received for out-of-county work to Allegheny County. As previously noted, the statutes require an accounting and a paying over of that money at [46] a definite, stated period, which appellant failed to do. *Nagle Engine and Boiler Works vs. Erie*, 350 Pa. 158, 38 A.2d. 225 (1944), held that after a maturity of bonds found to be owing by the City, the claim carried with it a legal right for interest from the time when the money was obligated to be paid. Interest is, as a general rule, demandable from the date the money is due.

The final basis for interest is the requirement that where the sum due can be fixed by fairly objective means, interest is owing. Under Pennsylvania law, the mere fact that the amount of liability is contested does

not mean that the amount is not liquidated or that it is not due. *E. C. Ernst, Inc. vs. Koppers Co., Inc.*, 626 F.2d. 324, 332, on remand 520 F. Supp. 830 (D.C. Pa. 1981).[24]

Sack vs. Feinman, supra, states that the treatise writers are in accord that "the better view seems to be that interest upon liquidated damages will be allowed from [47] the time of the accrual of the claim for liquidated damages." *Sack vs. Feinman, supra*, holds that a prayer for general relief in a complaint is a proper foundation for a claim to pre-verdict interest. The action in *Sack*, however, was one in equity where interest can always be awarded as part of the equitable disposition of the parties' claims.

As in *Lackawanna County's Appeals*, 296 Pa. 271, 145 A. 843 (1929), by failing to report the collection of sums, the officeholder has prevented the county from having an early judgment against the officeholder. Therein at page 279, the Court stated that, "This is a valuable right of which the county has been deprived." WHEREFORE, we conclude that it is not required that the debt be

[24] Interest is recoverable in Pennsylvania pursuant to the Restatement, Contracts, Sec. 337(a) (1932), now Restatement of Contracts 2d., Section 354 (1981) which deals with an obligation to pay interest on the debt or money value from the time performance was due. *Penneys vs. Pennsylvania Railroad Company*, 408 Pa. 276, 183 A.2d. 544 (1962), this is not the only occasion in which prejudgment interest is permitted. Appellant cites *Carbondale City School District vs. Fidelity Deposit Company of Maryland*, 346 Pa. 491, 31 A.2d. 279 (1943) for the proposition that pre-verdict interest is only proper where the debt is liquidated with some degree of certainty and the duty to pay has already become fixed. This case also holds, however, that interest is due from the date the demand was made despite liability being contested.

liquidated and fixed in order to recover prejudgment interest. In this case interest began to run from the date of assessment because the judgment was entered by operation of law upon the filing of the surcharge. Further, the computation of interest on the monies received from out-of-county cases was definitely ascertainable, and would have been known by the county if appellant had filed his reports as obligated by law.

Appellant's contention that interest is not permitted in a surcharge action as a matter of law is completely unfounded. *Snyder vs. Naef*, 36 Commw. Ct. 39, 389 A.2d. 212 (1978). There, the lower court was reversed and directed to enter a verdict in favor of the Controller, and that the defendant pay the claims plus the legal interest computed on the dates [48] in which the defendant received four separate payments for legal fees. In *Delaware River Joint Toll Bridge Commission vs. Miller*, 9 Bucks 104 (1959), interest was awarded on the claim from the date of the filing of the complaint against the defendant although there was a demand for interest generally without stating the starting date.[25]

Although an argument can be made that interest should commence on the date appellant received payment for out-of-county services, services by ACCO

[25] Appellant relies on cases where it is claimed no interest was charged. An example is *Indiana County vs. Long*, 40 D. & C. 32 (1940). The other cases cited by the appellant do not allow a conclusion as to whether interest was or was not charged, for there is no reference to interest in the printed opinion. *Likovich Appeal*, 347 Pa. 40, 31 A.2d. 543 (1943); *Loushay Appeal*, 169 Pa. Super. Ct. 543, 83 A.2d. 408 (1951); *Loushay Appeal*, 370 Pa. 453, 88 A.2d. 793 (1952); and *In Re: Appeal from Controller's Report of Olyphant School District*, *supra*.

for PP&TL and use of space in the Morgue for private autopsies, we decline to do so. This is not a case where the public official takes money from the public till. Rather, the monies were obtained, in large part, as a result of doing work beyond that required by law, and where much of the money, at least as to out-of-county sources, was used, at least in the eyes of appellant, to improve the Coroner's Office.

Therefore, interest shall run only from the dates of filing the surcharges.

[49] X. CAN THE APPELLANT SUCCESSFULLY CONTEND THAT THE CONTROLLER WAS AN IMPROPER PARTY TO PURSUE THE ACTION WHEN THE MATTER HAD BEEN PREVIOUSLY LITIGATED AND DETERMINED BY COURT ORDER OF JANUARY 25, 1980, AND WHERE THERE HAD BEEN NO APPEAL OF THE COURT'S DETERMINATION?

Appellee was ordered by Papadakos, J., on January 25, 1980, following arguments in open court that it

> "... remain as appellee and litigate the issues raised in the appeal filed by the appellant to the Controller's Supplemental-Amended Report Concerning the Allegheny County Coroner's Office 1967-1978."

This Order was not appealed. Therefore, we have the Controller acting as the appellee, but only because ordered to do so by the Court.

Appendix C—Opinion and Order En Banc of the Court of Common Pleas of Allegheny County.

The Second Class County Code, *supra*, is silent as to who has the obligation to pursue the case of the County against an officer who has been surcharged. 16 P. S. §4931, cited by appellant, deals only with the parties who have a right to appeal reports of surcharge to the Court of Common Pleas. They are the Commonwealth, the County, or the officer surcharged. This is a far cry from saying that only those named in 16 P.S. §4931 can prosecute the matter for the County as argued by appellant. If the appellant's argument that it requires specific authorization to entertain the action is followed, there could be no surcharge, for the statute does not give any particular office the authority to proceed as appellee with the possible exception of the County Commissioners. By virtue of 16 P.S. §3203, the [50] corporate power of the County is vested in the board of County Commissioners. However, in this case, one of the County Commissioners was the person surcharged. Certainly Papadakos, J., took this into account in determining who was the proper party to pursue this matter. It is to be noted that nowhere in the captions of the actions is there an effort to designate a plaintiff and a defendant. Appellee was acting on behalf of the County of Allegheny at the direction of the Court. We see no error.

XI. DID THE COURT ERR IN ALLOWING A $76,805.63 CREDIT AGAINST THE SURCHARGE?

Appellant argues that this Court did not give enough credit and appellee argues that it should not have given any credit. This Court resolved, in point V of this Opinion, that it was an error to grant appellant a credit of $76,805.63 under the Act of 1945 [65 P.S. §§191, 192].

This Court first questioned its previous decision during the course of the oral argument by appellant's counsel when he contended that he did not understand how the Court could divide the monies claimed as benefits, allowing some and not others. This is a very potent argument for there is no statutory authorization for the things which the defendant did with the monies in the PEF. The Court is left without a criteria to determine what should be permitted as a credit.

Only in the event that it is resolved that this Court is in error in its position denying benefits under the Act [51] of 1945 [65 P. S. §§191, 192] are the following matters raised by appellant, through his brief in Point I-H, considered.

This Court gave to the appellant credit in its verdict of $60,794.45 for salaries to Dr. Perper and five doctors who participated in the residency program. Appellant would have us give credit for payments to all of the personnel paid money out of this fund regardless of what they may have been doing. They are as listed on appellee's spreadsheet, Exhibit 75: Patty Gahagan, Milton J. Doyle, Anthony J. Pankowski, Kelly Services, Mis-classifications, and Liken-Lucky Lady. Appellant would even desire that we make allowance for payment to Dr. E. Davis, the pathologist paid by appellant to cover weekends although at that time, not a County employee, apparently unknown to the Salary Board and to County Commissioners. Adding Dr. Davis to the table of organization permitted those who would normally be required to cover on weekends, to be free of that duty. The difference between the salary credits allowed and the

additional credits appellant claims should be given is $2,298.98. There was no effort made by appellant to demonstrate the benefits to the improvement of the Coroner's Officer made by the personnel whose salary credits were denied by this Court.

Appellant argued that the Court should have given a credit of $29,388.50 paid from the PEF for salaries and payments to technicians, histologists, secretaries, photographers and others for their work on out-of-county autopsies. This Court did conclude, in Finding of Fact 45, Opinion, page 36, [52] that neither appellant nor his staff were required to perform such services. It may be this very type of argument that caused appellant's counsel to question how the Court could allot certain monies for salaries, but not to others, and as previously stated, it was that argument that caused this Court to review the previous decision giving appellant a credit under the Act of 1945 [65 P.S. §§191, 192]. However, the argument as made by appellant's counsel demonstrates the reason why county government must operate under the restrictions of the statutory scheme for employment and payment for services. This Court is not satisfied that there were not sufficient hours in the day to perform out-of-county autopsies, nor that autopsies were performed during the normal workday. Appellant assumes that if the Commissioners had consented to the performance of the out-of-county autopsies, that the Coroner would be obligated only to report or turn in the gross profits minus the reasonable and necessary expenses. We seriously question that assumption. That again would have left to appellant the decision as to what was reasonable and necessary expenses; the fox would be

guarding the henhouse door. Rather, the Commissioners might well have informed appellant that if he wished to perform out-of-county autopsies, he certainly could as long as he could continue his county duties, but that the out-of-county cases were to be done during normal working hours without extra compensation. The practice of paying overtime or [53] monies for special services is insidious because it favors one officeholder's employees over the other and, on occasion, can cause the less conscientious employees to not perform to their very best ability during the course of the work day in the hope of convincing their employer that they should be permitted to work overtime to complete their task. WHEREFORE, we see no merit in this contention.

The appellant further contends that the Court erred in not giving a credit of $6,552.45 for professional lunches and dinners. There is no authorization in the Second Class County Code or the County Code for the payment for lunches and dinners. The fact that one Common Pleas Court in *Audit Report of Township of Bristol 1967*, 57 D. & C. 2d 18 (1972) allowed $140.90 for a dinner at the time of a dedication of a municipal building and highway garage which was an event of great civic importance and affected the public interest does not authorize the common practice followed by appellant of providing lunches and dinners during the discussion of business. In *Audit Report of the Township of Bristol 1967, supra*, there is a detailed review of Pennsylvania law concerning the use of public funds for such expenditures. With very few exceptions they have been denied, the Court concluding that expenditures for functions which are essentially social or hospitable in nature are clearly

improper. If every officeholder could pay out of the public coffers lunches and dinners on a regular basis at whatever restaurant or [54] banquet hall he desired, there would be no limit to the expense of government. The legislature has not made provision for such expenditures.

Appellant excepts to the Court allowing but $6,505.63 for membership dues in some medical organizations and for trips for educational purposes within the United States when by appellee's Exhibits 72 and 77, a total of $59,399.58 of PEF monies were expended on memberships and training. Again, there is no provision in the Second Class County Code for membership dues and training. The Court in its discretion limited the expenditures to those within the continental United States and those educational and medical organizations directly related to appellant's position as Coroner.

A review of Exhibit 72 which is a spreadsheet of "PEF Disbursements Seminars and Training" quickly demonstrates the extent of travel and the number of conferences attended by appellant and his employees. Included in Exhibit 72 are monies paid for speakers for seminars. These, of course, were regarded as deductions by appellee to arrive at the total surcharge and cannot be properly counted by appellant in arriving at his total claimed credit. There must, in fact, be some limit on expenditures for attendance at conference after conference. The legislature wisely makes provision for such attendance as to certain officers of the county. [55] Unfortunately for appellant, there is no provision for monies for seminars for the Coroner.

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In considering the disbursements for membership dues as taken from appellee's Exhibit 68, it is most apparent that appellant joined most every organization which was remotely associated with his position of Coroner and some which were not so related. For example, in 1972, appellant paid from the PEF for himself dues or memberships in nineteen different organizations. He maintained memberships through this fund, inter alia, in Phi Delta Epsilon Club of Pittsburgh, the Society of the Sigma Xi, Scribes, the Young Democratic Club of Allegheny County, the National Geographic Society and many others.

It was argued at the outset of the case by appellant's counsel that not one penny of the PEF went for the appellant's personal purposes. An examination of Exhibit 70 which list disbursements from the PEF for personal/political contributions, denies the absolute certainty of that statement. Although one traffic ticket is paid from this fund, the notations of greater significance are payments for flowers and campaign fund contributions.

Appellant would have the Court give him credit for $5,074.04 for legal fees incurred as a result of what is captioned, "The Monday Massacre." This expenditure occurred when in January, 1977, a new Board of Commissioners endeavored to cut the number of employees in certain row offices, including [56] that of the Coroner. The latter was to lose ten employees. The row offices affected then filed an action against the Board of Commissioners for which the Coroner's legal fees involved were paid. There is no authorization in law

for a row officer to incur expenses from monies owing to the County for a lawsuit against the County Commissioners. To allow such an expenditure is to invite litigation against the County Commissioners by disappointed officeholders. This cannot be tolerated.

Finally, the greatest credit appellant claims which the Court did not allow was $22,064.00 which was paid to a firm of certified public accountants to prepare financial statements of the PEF for the years 1976-1978. Appellant had never declared or paid taxes on any of the monies. There was widespread publicity concerning the fund. Therefore, appellant engaged accountants to prepare the necessary returns and audit the accounts. The settlement of the tax consequences through the services of the accountant benefitted only appellant, not the County. If appellant had turned over the monies to the County, as was required by law, he would not have been confronted with the problem of accounting to the federal government for income tax purposes. WHEREFORE, there is no question that the disallowance of this sum was proper. We see no merit in this contention.

[57] XII. DID THE COURT ERR IN ALLOWING CREDIT FOR SALARIES PAID FOR THE PROFESSIONAL EDUCATION FUND FOR THE YEARS OF 1970 THROUGH 1972?

This Court has ruled that appellant cannot take the benefit of the Act of 1945 [65 P.S. §§191, 192] and therefore, no credit is allowed. Only in the event that the Court is in error is this contention of concern. Appellee

contends that there was no evidence presented to establish monies received for the years of 1970-1972 by the PEF and, therefore, a credit should not be given for wages paid from the PEF for that period.

The Court granted a credit under the Act of 1945 [65 P.S. §§191, 192] for salaries of nearly $61,000.00. The figure was taken from Exhibit 75 which is a spreadsheet of the employees' salaries for the years 1970 through January 31, 1979. The actual figure for the total of salaries allowed was $60,794.45. Of that figure, $46,500.00 was attributable to Dr. Perper. Appellee claims that $6,000.00 was allowed by the Court for Dr. Perper's supplemental salary for 1972. However, in computing the credit given for Dr. Perper's salary in 1972, the Court followed Exhibit 75 which showed a $2,600.00 disbursement from the PEF. The Court also gave credit in 1972 for a $250.00 payment to Dr. Galicano Inguito. There was no credit given for any other employee salaries for 1972. Therefore, the credit given for salaries in 1972 was in the amount of $2,850.00.

Although appellee argued that the surcharge period [58] commenced in 1970, the testimony of Robert Lentz, who was in charge of the audit team from the Controller's Office, was that he was unable to trace the source of monies into the PEF from out-of-county sources for the years 1971 and 1972. Trial Transcript, Volume I, page 107. WHEREFORE, if the Court is incorrect in not giving credit to appellant under the Act of 1945 [65 P.S. §§191, 192], there must be an adjustment in the total credit of $76,805.63 by $2,850.00.

XIII. DID THE EVIDENCE UNEQUIVOCALLY ESTABLISH THAT THE APPELLANT ENGAGED IN NO FRAUDULENT OR COLLUSIVE CONDUCT THEREBY PERMITTING THE COURT TO APPLY THE ACT OF MAY 15, 1945, P.L. 538, No. 210 [65 P.S. §§191, 192]?

This point was the subject of a great deal of the testimony and most of the heat generated during the course of the trial. By the ruling of this Court, in Point V, the issue is mooted. This Court concluded that appellant could not take advantage of the Act of 1945 but for other reasons. Solely in the event that the Court is in error in its ruling in Point V of this Opinion and Order, is the matter now addressed.

The Act of 1945 [65 P.S. §§191, 192] does not apply to cases involving "... fraud or collusion on the part of such officers ..."

In discussing this statute in the Adjudication Opinion, this Court stated, at page 5-6,

> "The defense contends that because there is no showing of fraud or collusion, that portion of an Act passed by the Legislature [59] in 1945 must be applied to prevent the Surcharge. Although argued by the Controller that there is collusion, this Court finds no evidence to establish it. Whatever Dr. Wecht did, we believe it was on his own volition without the knowing joinder of third persons. There is evidence from which a person could question whether there was fraud; such as the failure of Dr. Wecht to report to the Controller the existence of

> the Mellon Bank accounts which were solely in his own name and control, and where he placed the monies received from out-of-county autopsies and lab work. This failure to report was after a specific request was made in writing by Controller Lynch. The deliberate failure to disclose a material fact can be a fraud. Dr. Wecht testified that he relied upon his attorney to prepare the responding letter. We accept that testimony.
>
> The matter of fraud is not without doubt, but the Controller did not furnish the clear, convincing, precise and direct evidence required under our law."

That ruling is what is now subject to review.

We again conclude, as we did in the Adjudication Opinion and Findings of Fact, that there was no collusion by appellant with any other known person. Nor does appellee attempt to point to any evidence in his brief of such collusion. Therefore, the issue is limited to fraud.

Fraud is never presumed. *Snell vs. Commonwealth State Examining Board*, 490 Pa. 277, 416 A.2d 468 (1980). It is firmly established that under the law of Pennsylvania a party who alleged fraud, as either a defense or the basis of a claim, must prove the facts on which his allegation rests by evidence that is clear, precise and indubitable. The evidence must be so cogent as to enable the factfinder [60] to come to a clear conviction without hesitancy, as to the truth of the precise facts alleged. *Ratay vs. Lincoln National Life*

Insurance Company, 378 F.2d. 209 (3d Cir. 1967), cert. denied 389 U. S. 973 (1967) on appeal after remand 405 F.2d. 286 (3d Cir. 1968). *Gerfin vs. Colonial Smelting and Refining Company, Inc.*, 374 Pa. 66, 97 A.2d. 71 (1953); *Forms, Inc. vs. American Standard, Inc.*, 546 F. Supp. 314 (E.D. Pa. 1982). The witnesses must be credible, distinctly remember the facts to which they testify, and narrate the details exactly. *Edelstein vs. Carole House Apartments, Inc.*, 220 Pa. Super. Ct. 298, 286 A.2d. 658 (1971).

The elements required to establish fraud are set forth in *Mancini vs. Morrow*, _____ Pa. Super. Ct. _____, 458 A.2d. 580 (1983). They are: (1) a false representation of an existing factor; (2) that if the misrepresentation is innocently made, then it is actionable only if it relates to a material matter to the transaction involved; while if the misrepresentation is knowingly made or involves a non-privileged failure to disclose, materiality is not requisite of the action; (3) scienter, which may be either actual knowledge of a truth or falsity or representation, reckless ignorance of the falsity of the matter, or mere false information where a duty is to know is imposed on a person by reason of special circumstances; (4) reliance, which must be justifiable, so that common prudence or diligence could not have ascertained [61] the truth; and (5) damage to the person relying thereon. There must, of course, be a justifiable reliance on the misrepresentation by the person defrauded. *Glanski vs. Ervine*, 269 Pa. Super. Ct. 182, 409 A.2d. 425 (1979). Fraud may be made out by suppression of the truth. *Frowen vs. Blank*, 493 Pa. 137, 425 A.2d. 412 (1981); *Shane vs. Hoffman*, 227

Pa. Super. Ct. 176, 324 A.2d. 532 (1974). Fraud may be made out by silence. *Reichert Estate*, 356 Pa. 269, 51 A.2d. 615 (1947). This may be through a failure to disclose; *Quashnock vs. Frost*, 299 Pa. Super. Ct. 9, 445 A.2d. 121 (1982), or it may be a deliberate non-disclosure. *Neuman vs. Corn Exchange National Bank & Trust Company*, 356 Pa. 442, 51 A.2d. 759 (1947); *O'Callaghan vs. Weitzman*, 291 Pa. Super. Ct. 471, 436 A.2d. 212 (1981). A party is chargeable with that which can be readily discovered. *Marian Bank vs. International Harvester Credit Corp.*, 550 F. Supp. 456 (E.D. Pa. 1982).

Two governmental unit cases involving fraud are discussed. In both cases fraud was either not found or concluded to have been improperly found. In *Davis et al. vs. Carbon County, supra*, it was held to be error for the lower court to determine as a matter of law that fraud had been committed by a County Commissioner. The Court concluded there did not appear to be even a scintilla of evidence that would warrant justifying presentation to a jury the question of fraud for there was no indication that the commissioners [62] intended to profit personally. Similarly, *In Re: Audit of School District of City of Scranton (No. 1), supra*, because there was no evidence of intent to profit personally, fraud was not found.

Throughout the instant case, one salient fact prevailed; that is, appellant wished to improve the Coroner's Office and to make it one of the best, if not the best, in the United States. Although there is an argument as to expenditures of monies for flowers, political contributions and the payment of one parking ticket, for the most part,

the monies from the PEF were expended for what appellant honestly believed to be the betterment of the citizens of Allegheny County, although the desire for self-grandizement cannot be removed from consideration of this issue.

Appellee uses Findings of Fact he submitted and which were approved by the Court to establish his contention of fraud. By appellee's Proposed Findings of Fact 71 and 72, accepted by the Court, appellant did not disclose to the Salary Board, of which he was a member, the monies which he had in his private bank account and which were regarded by him as the PEF or of the additional salary and compensation arrangements made with Dr. Perper and other ACCO employees. There is no evidence, however, that he was ever asked during any of the many Salary Board meetings that he attended whether he had additional funds or was supplementing the salaries of his employees. In any event, we do not conclude that [63] his failure to disclose was for the purpose of defrauding the County.

By Appellee's Finding of Fact 73, the Court concluded that appellant did fail to obtain authorization or approval from the County Board of Commissioners for use of the Morgue, its facilities and employees for the performance of autopsies for out-of-county coroners, private autopsies and histology/toxicology testing services. However, this Court concluded in its own Findings of Fact 5 and 6 as to fraud that appellant relied on his solicitor for a response as to reporting such monies, that the practice of having a PEF was established by Dr. Hunt, subsequently a County Commissioner, and was followed

by appellant's predecessor, Dr. Stalter. Further, that the inquiry from Controller Lynch by letter in 1976 and the response prepared by appellant's solicitor were taken by use of the language of the statute quoted in the letter as requiring the reporting of "public monies." His concept, and apparently that of his Solicitor, was that the PEF was not public monies. Although we have concluded that they were wrong in that assumption, we cannot say that it was done with fraudulent intent.

Appellee's Finding of Fact 74 dealt with a fact which permeated the entire case, i.e., that appellant did not report to appellee any of the fees received by him from 1970 through 1978 in performance of services which form the basis of the surcharge. This again centers on the interpretation [64] of the statute as to the definition "public monies." Although appellant's interpretation was determined to be wrong, we do not conclude there was any fraudulent intent.

Appellee's Finding of Fact 82 dealt with the failure, in the PP&TL annual reports required of Bio-chemical Laboratories, to list the Morgue as a reference lab. This was covered by Finding 9 of the Court as to fraud and was not excepted to by appellee. It was concluded that appellant did not regard the Morgue in the category of a reference lab that required reporting.

This Court did find, through appellee's Findings of Fact 90 and 91, that appellant appropriated the fees from out-of-county services and PP&TL work, but concluded that it was not necessarily done fraudulently

or with the intent to deceive the County. As stated in *In Re: Audit of School District of the City of Scranton (No. 1), supra,*

> "Even if their failure to comply with the provisions of the Code had been a conscious derelection on their part, it would not necessarily have stamped their actions as dishonest. Honesty is concerning with the moral rather than the legalistic import of an act; these directors were not guilty of any moral turpitude."

Similarly, we conclude that appellant was not guilty of any moral turpitude. He misconstrued the applicable law based on the advice of his solicitor and by this Court's Orders must pay for that misconstruction. That, however, is a far cry from concluding that he fraudulently kept monies from the County.

[65] XIV. DOES THE OPINION OF THE COMMONWEALTH COURT IN *In Re: Controller's Subpoena Concerning the Professional Education Fund of Allegheny County Coroner's Office,* 62 Pa. Commw. Ct. 58, 434 A.2d. 1323 (1981) PREVENT THE APPLICATION OF THE ACT OF 1945 [65 P.S. §§ 191, 192]?

It was argued by appellee that the decision of the Commonwealth Court in *In Re: Controller's Subpoena Concerning the Professional Education Fund of the Allegheny County Coroner's Office,* 62 Pa. Commw. Ct. 58, 434 A.2d. 1323 (1981) prevents the application of the Act of 1945 [65 P.S. §§191, 192]. The argument of appellee was that since the record disclosed that

appellant had not submitted full and complete returns as required by 16 P.S. §4802, appellant is not entitled to the benefits of the Act of 1945 [65 P.S. §§191, 192] or any other rule of law which affords its protection against a surcharge, to a public official. The case does not mention whether the Act of 1945 is applicable. If appellee's position is correct, in all cases that were decided between 1945 and 1969 when the Act of 1945 was in effect, the benefits of the Act could not be used unless the defendant officeholder had filed an accounting within the prescribed period. A review of the cases decided under the Act of 1945 [65 P.S. §§191, 192], in Point VI, fails to disclose any case where that advocated by appellee has been followed.

Although we conclude that the Court did err in permitting a determination of the actual loss by use of the Act of 1945 [65 P.S. §§191, 192] we do not believe that the argument [66] espoused by appellee concerning the effect of the opinion is controlling.

XV. DID THE COURT ERR IN MODIFYING THE APPELLANT'S PROPOSED FINDING OF FACT NO. 29 BY ELIMINATING THAT "ALL OF THE TIME THAT HE WAS A COMMISSIONER OF ALLEGHENY COUNTY" DR. HUNT KNEW OF THE PROFESSIONAL EDUCATION FUND?

Dr. Hunt was not a Commissioner of Allegheny County throughout the entire surcharge period. He was a Commissioner from January of 1968 until January of 1976. He was reelected and served again as Commissioner from 1980. Although it is true that Dr.

Hunt established an account in his own name at Mellon National Bank, the total receipts in that account were but $1,757.00. Dr. Ralph J. Stalter, the successor to Dr. Hunt, also established a similar checking account in his own name. The monies placed in this account during his two-year tenure were also negligible in relation to the monies placed in appellant's account. In 1968, $2,820.00 was placed into Dr. Stalter's account while in 1969, a slightly lesser sum of $2,710.00. By 1973 appellant's bank account in the name of "Cyril H. Wecht, M.D." showed an increase in deposits to $10,780.00 and by 1976 to $32,822.00, while in 1978, $33,080.00 was deposited. The total monies deposited were $143,513.30 from January 1973 to December 31, 1978.

The knowledge of the continued operation of the fund which appellant desires to attribute to Dr. Hunt concerns a written inquiry by Dr. Hunt to Dr. Stalter as to whether [67] or not there was an educational account from which monies could be paid for reprints of previous publications, appellant's Exhibit M. Dr. Hunt was not called as a witness by either party. Further, there is no basis in fact that knowledge of an occurrence within county government by one commissioner is necessarily knowledge by other commissioners. Former Commissioner Robert N. Peirce, Jr. testified that he was not aware of any such funds during his tenure from 1976 through 1979. Nor would the fact that out-of-county autopsies were being done at the Morgue permit a conclusion that appellant was violating the law and not reporting the income from the autopsies to the County.

When a surcharge is proper and the Act of 1945 [65 P.S. §§191, 192] or similar statute is not applicable, the good faith of the public officer is of no moment. In *Likovich Appeal, supra,* illegal payments made through ignorance of the pertinent statutes and without fraudulent intent did not release the officers from liability of surcharge. In *Cotlar vs. Warminster Township,* 8 Pa. Commw. Ct. 163, 302 A.2d. 859 (1973), the Commonwealth Court held at page 862,

> "The fact that public officials made illegal payments in good faith and without fraudulent intent, does not relieve them of liability to surcharge." [Likovich Appeal].

Further, that,

> "We must conclude that an elected official derives equally his authority and his compensation from the law and, when both are defined in the law, he can no more enlarge the one than the other." [Citation omitted.]

[68] Finally, in *Lackawanna County's Appeals,* 296 Pa. 271, 145 A. 843 (1929), it was held that where an official appropriated public funds to his own use, he was not permitted to defend his wrongful conduct on the grounds that he acted in good faith, believing that he was personally entitled to use such funds, whether by custom or otherwise, nor by showing common knowledge that he was keeping them, or even the knowledge and approval of his actions by other public officers. The failure to make reports of such collections of money is a concealment thereof, so far as concerns the public

generally, and will not be excused by proof that the County Controller had statutory authority to require the production of books and papers to determine delinquincy.

In the instant case the appellee specifically requested information concerning the accounts and monies that appellant may have had, but appellant failed to report that he did have public monies.

Finally, appellant argued that because other jurisdictions permit the use of their Morgue for private services without compensation to the County, he should be permitted to do so as well. A custom or usage is not legal if it is against public policy or if it is repugnant to the express provisions of a statute. 11 P.L.E., Customs and Usages §3. No statute can be nullified or made inapplicable by proof of a custom which conflicts with it. In *Allen vs. Mack*, 345 Pa. 407, 28 A.2d. 783 (1943), it was held, "A custom or usage repugnant [69] to the express provisions of the statute is void." *See also Lanigan vs. Lewis*, 210 Pa. Super. Ct. 273, 232 A.2d. 50 (1967). In *Commonwealth vs. Schwartz*, 210 Pa. Super. Ct. 360, 233 A.2d. 904 (1967), affirmed 432 Pa. 522, 248 A.2d. 506 (1968), the claimed error was in excluding from the evidence an alleged custom as to the practices of magistrates and constables to charge greater amounts for services than the amounts authorized by statute. The Court held that a custom or usage repugnant to the express provisions of the statute is void.

WHEREFORE, we see no merit in this contention.

XVI. DID THE COURT ERR IN MAKING FINDING 10 OF ITS FINDINGS IN ADDITION TO THE CONTROLLER'S FINDINGS AS TO FRAUD?

The Court's Finding 10 reads,

> "Prior to an inspection by the Center for Disease Control for permission to transport tissue for processing interstate, Dr. Wecht did bring a tissue processor to the laboratory at Pittsburgh Pathology & Toxicology Laboratory at 3600 Forbes Avenue which remained for an undetermined period thereafter up to several months. There was no clear and precise evidence that the tissue processor did in fact come from the Morgue of Allegheny County."

In support of their positions, both sides rely on the testimony of Lois Warren, a secretary at PP&TL.[26] She was asked whose tissue processor it was. She responded that it was Dr. Wecht's from the Morgue, and then, "It was from the Morgue." She stated that she could not remember [70] how long it remained at PP&TL, but she believed that it remained for several months after the inspector left. She assumed that it was returned to the Morgue, but she did not really know. She was asked what she meant by her previous testimony of "Dr. Wecht's at the Morgue," but before she had an opportunity to answer, a further question was asked, "Was it your understanding anything at the Morgue was Dr. Wecht's or do you know that Dr. Wecht owned this tissue—" She answered, "No." She stated that the only reason that she answered as she did was that Dr. Wecht said that the machine was not working and he was going to try to do something with it. She said, "I didn't know

[26] Trial Transcript, Volume 4, pp. 33, 36, 54.

for sure that it belonged to the Morgue or whether maybe he bought it. I didn't really know." She did acknowledge that it had one of those stickers like "I have seen in this room somewhere." Finally, she was asked, "The business about the tissue processor, is it fair to say when you get down to it you don't really know who owned it?" Answer, "Right." WHEREFORE, it was concluded at the time of the Adjudication and it is reaffirmed at this time that there was no clear and precise evidence concerning this subject.

XVII. DID THE COURT ERR IN HOLDING THAT DR. WECHT OPENLY SOLICITED OUT-OF-COUNTY CORONERS AFTER HE LEFT OFFICE?

This matter arose from the modification of appellant's proposed Finding of Fact 86. The Finding, with the modification [71] underlined, reads,

> "Since 1979, Dr. Wecht openly solicited out-of-county coroners and has conducted autopsies for out-of-county coroners, including the coroner of Westmoreland County who previously furnished approximately 70% of the out-of-county autopsies, and other private autopsies at Central Medical Pavilion without charge to him by the hospital."

The context in which the conclusion that appellant solicited out-of-county coroners, arises from the adjudicatory Opinion, page 7. There, the Court commented that the argument of appellant that performing out-of-county and private autopsies as well as reading PP&TL slides, was required to train and maintain the proficiency of the Morgue staff ". . . loses

much of its initial appeal when we learn that Dr. Wecht openly solicited out-of-county Coroners after he left office and retained much of that business privately." Further, it was noted that he no longer sent surgical slides to the ACCO Toxicology Lab and participated as a County Commissioner in voting to remove the Toxicology Lab from the control of the Coroner even though one of his principal expert witnesses, Dr. Stein, the Chief Medical Examiner of Cook County, Illinois, testified as to the importance of having a first-rate toxicology laboratory under the Coroner's control. Appellant did send a letter to at least some of the out-of-county coroners who had previously sent work to ACCO, soliciting their continued work which he would perform at Central Medical Pavilion.[27] [72] It is argued that appellant had every right to do so. We agree that there was nothing legally wrong in his doing so.

The import of the testimony as taken by this Court, however, was that appellant was endeavoring to support the free use of the Coroner's facilities for private autopsies and out-of-county autopsies while he was Coroner under the theory that the work was undertaken as a benefit to the personnel in the Coroner's Office. If that be true, and he was genuinely interested in the continued improvement of the abilities of the personnel of the Coroner's Office, logic would dictate that he would desire that among other things, out-of-county autopsies continue to be done in that office rather than his soliciting the out-of-county coroners for his own profit.

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[27] Trial Testimony, Volume 9, pp. 200-1.

We can see no error in the logic of the argument that appellant was apparently more interested in financial gain than in the continued improvement of the staff of the Morgue which he had developed over a number of years. HENCE, we see no error.

[73] XVIII. DID THE COURT ERR IN CONCLUDING THAT DR. WECHT COULD HAVE OBTAINED SURGICAL TISSUE FOR TESTING WITH MINIMAL EFFORT?

This matter arose from proposed Finding of Fact 103 as submitted by appellant, and as modified by the Court. The Finding as originally proposed was that surgical specimens provided to ACCO by PP&TL between 1970 and 1978 were beneficial to the Coroner's Office. The Court added the word "minimally." This was based on the concept that surgical tissues could be obtained from other sources by appellant if he desired. The difficulty which appellant envisioned in having the residents examine slides if the supply from PP&TL was shut off did not appear to be a problem to Dr. Michael Baden, Deputy Chief Medical Examiner, Suffolk County, New York. He simply sent his residents around the block to Bellevue or to the New York University School of Medicine's University Hospital where surgical slides were available. Similarly, this Court concludes that if the Coroner of Allegheny County really wanted to have slides made available to the residents, whether it be from one of the hospitals or by ordering them from subscription services which are available for that purpose,[28] it could be accomplished.

[28] Testimony of Dr. Robert Stein, Volume II, p. 101.

We agree with the position of appellee that the real issue is not the availability of the slides for the residents, but the money-making potential from reading slides accomplished [74] in this case, for which there has been no accounting to the County. HENCE, we see no merit in this contention.

XIX. DID THE COURT ERR IN REFERENCE TO THE RELATIONSHIP OF APPELLANT AND THE ACCO TOXICOLOGY LABORATORY?

This is the third of a trilogy of complaints made as a result of comments by this Court in this Adjudication Opinion, pages 7 and 8, that the contentions of appellant lost much of their initial appeal when his conduct after going out of office is considered in comparison to his strong feelings concerning ACCO and the Toxicology Lab while in office. We agree that it is essential that there be a competent director and employees in a toxicology lab under the direction of the Coroner. This was testified to by the appellant's expert, Dr. Stein, the Chief Medical Examiner of Cook County, Illinois. Appellant's position, however, is ambivalent. In Point I-E of his brief, appellant claims the Court erred in surcharging him for the activities of Dr. Winek. There, he would contend that Dr. Winek, as director of the Toxicology Department, had virtually complete autonomy. This was for the purpose of attempting to convince the Court that he should not be surcharged for the monies diverted from the County for activities of Dr. Winek. However, appellant takes umbrage with the conclusion that when appellant voted to cut Dr. Winek and the Toxicology Laboratory free of the control of

appellant's successor to the position of Coroner, Dr. Perper, he, in effect, reversed his position that it [75] was important Dr. Winek's laboratory be part of the Coroner's Office.

We believe the initial argument of appellant did lose much of its appeal when it was combined with the solicitation of out-of-county coroners for their private business, the loss of the PP&TL which had been furnished the ACCO staff pathologists to increase their experience, and voting to remove the toxicology lab from the control of the Coroner.

XX. DID THE COURT ERR IN PERMITTING THE ADMISSION OF PLAINTIFF'S EXHIBITS 55, 56, and 66 INTO EVIDENCE?

Appellant claimed error in the admission of appellee's Exhibits 55, 56 and 66 into evidence because there was such a divergence between that alleged and that proved that the entire claims for surcharge as to services rendered by ACCO to PP&TL must be denied. Basically, the contention would appear to be that because appellee proved substantially less than he initially alleged in the surcharges, there can be no recovery of any amount. The starting point is the Lynch Surcharge, page 107, as follows:

> "VII. *Pittsburgh Pathology & Toxicology Laboratory—Cyril H. Wecht Administration*—lists receipts totaling $157,740.30 received by Pittsburgh Pathology & Toxicology Laboratory for the histology testing during the years of 1971 through 1978, inclusively, for which Cyril H. Wecht

is surcharged $118,305.23. This amount is equal to 75% of the total gross receipts allowing for 25% of the total tests to have been performed at Pittsburgh Pathology & Toxicology Laboratory instead of at the Morgue. The total receipts are [76] broken down into five (5) categories which conform to categories of records obtained by the Controller's Office. Note that 93% of the total receipts were from West Allegheny and Podiatry (Doctor's) Hospitals. Separate log books listing in detail the histology testing for these two hospitals were maintained by the staff at Pittsburgh Pathology & Toxicology Laboratory. The Controller's Office, however, did not gain access to these log books. Mr. Feeney, Dr. Wecht's attorney, told us that Dr. Wecht had taken them from the laboratory in November of 1978 and had discarded them. Controller's auditors had to reconstruct this flow of activity and receipts from records obtained from the two hospitals. The remaining 7% of the total receipts were taken from records left at Pittsburgh Pathology & Toxicology Laboratory."

The surcharge for the activities of PP&TL is in the amount of $58,354.00. The Exhibits have been introduced into evidence. See Trial Transcript, Volume 13, page 4, as to Exhibit 55; page 7, as to Exhibit 56; and page 8, as to Exhibit 66. However, appellant's counsel subsequently stated his basis for a Motion to strike as follows:

"... now that we have heard the testimony on 55, 56, and 66 in spite of my not having objections to the admission of the exhibits in evidence, I move to strike

> the exhibits and any of the evidence on the grounds that it is totally different from the complaint filed in the assumpsit action using the earlier case, using Judge Papadakos' ruling that the allegations in the surcharge are to be taken as allegations in the complaint filed in assumpsit, and this evidence is totally different from and contrary to the allegations in the surcharge as to the surcharge work done for PP&T. Again, the provata is different from the allegata."[29]

[77] The surcharge as to PP&TL was composed not only of that learned from Plaintiff's Exhibits 55, 56, and 66, but all of the Exhibits dealing with PP&TL and evidence concerning the same. From that, taking the years 1970 through 1978, the total number of grosses done was 8,225. Two dollars per test, as the monies to be paid to the County, appear to be proper for a total of $16,450.00. The charge to the patient by PP&TL was $10.00. Micro tissue testing is more difficult and customers were charged $15.00 by PP&TL for this service. From 1970 through 1978, 6,240 such tests were performed. The Court concluded that $5.00 per micro was a reasonable charge for a total of $31,200.00. It appeared clear that a substitute pathologist was required for appellant on the average of twenty days per year. Over the nine-year period, 32.9 gross specimens at $8.00 per specimen would be examined by the pathologist in a twenty-day period. During that same period 27.2 micros, at $10.00 per micro, would be examined for a total of $10,704.00.

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[29] Trial Transcript: Volume 13, pp. 11-2.

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The law is clear that a variance between the pleading and the proof will not require a reversal of judgment where the appellant was neither surprised nor misled. Counsel for appellant can scarcely claim to have been surprised or misled for, initially, he permitted the Exhibits to be admitted without any objection, and only thereafter concluded that the Exhibits and all other evidence should be stricken because of the alleged variance. Furthermore, the modern [78] tendency is to abolish technical refinements as to variance, with a view to securing substantial justice. *Domineck et ux. vs. Tuskan et al.*, 20 Pa. Super. Ct. 608, 193 A.2d. 626 (1963); *Glanski vs. Ervine*, 269 Pa. Super. Ct. 182, 409 A.2d. 425 (1979). Trials by a court without a jury proceed as in equity. *Domineck et ux. vs. Tuskan et al., supra; Lytle, Campbell & Co. vs. Somers, Fitler and Todd Co.*, 276 Pa. 409, 120 A. 409 (1923).

In that the evidence in most part came from the records of appellant, it is difficult to see how he can claim that he was surprised by what those records revealed. WHEREFORE, we see no merit in this contention.

XXI. DID THE COURT ERR IN NOT PERMITTING THE CONTENTION OF RES JUDICATA AND OF COLLATERAL ESTOPPEL TO APPLY SO AS TO PREVENT THE CONTROLLER FROM INTRODUCING EVIDENCE CONCERNING THE ACTIVITIES OF APPELLANT AND HIS EMPLOYEES AT THE ALLEGHENY COUNTY CORONER'S OFFICE FOR PITTSBURGH PATHOLOGY & TOXICOLOGY LAB, INC.?

This argument is based on a jury's general finding of appellant not guilty of criminal charges of theft of services by diversion.[30]

Of the four sources of money which were the subject of the surcharges, this defense applies only to those monies involving PP&TL. It is suggested in *Chisholm vs. Defense* [79] *Logistics Agency*, 656 F.3d. 42 (3d Cir. 1981) that even though collateral estoppel is usually foreclosed in a subsequent civil suit because of a different standard of proof, at the very best, it can be used only as to those issues actually litigated and decided in an earlier proceeding. Therefore, it was held a general verdict of a jury without special findings leaves the trial court in a civil action without knowledge of what was actually decided.

Nor does appellant supply any authority supporting his position that an acquittal in a criminal proceeding

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[30] Act of 1972, Dec. 6, P. L. ____, No. 334, §1. As amended, 1978, April 28, P. L. 85, No. 40, §1; 1978, Nov. 26, P. L. 1326, No. 321, §1 [18 Pa. C.S.A. §3926(b)].

forecloses or prevents the continuance of an action of surcharge by the County against an officeholder.[31]

[80] The doctrine that evidence of acquittal in a criminal case is not admissible and is irrelevant in a civil case on the same facts is longstanding. *Mineo vs. Eureka, Sec. F. & M. Ins. Co.*, 182 Pa. Super. Ct. 75, 125 A.2d. 612 (1956); *Walbert vs. Farrina*, 411 Pa. 400, 192 A.2d. 404 (1963); *Simpson vs. Robinson*, 238 Pa. Super. Ct. 555, 361 A.2d. 387 (1976).

[31] Appellant cites four cases all against his position: *Greenberg vs. Aetna Insurance Company*, 427 Pa. 511, 235 A.2d. 576 (1976), cert. denied 392 U. S. 907 (1968), where a defendant was acquitted of arson, burning to defraud an insurance company and conspiracy as to arson. Based on the difference in the burdens of proof, the Court held that the fact the insured had been acquitted was irrelevant and inadmissible in a civil action to recover damages. In *Hurtt, Trustee vs. Stirone*, 416 Pa. 493, 206 A.2d. 624 (1965), cert. denied 381 U.S. 925 (1965), the defendant was convicted of racketeering and extortion in Federal Court and was sued civilly in state Court. There, the Court permitted evidence of the conviction to be used in the civil case. In *Pennsylvania Turnpike Commission vs. U. S. Fedelity and Guaranty Company*, 412 Pa. 222, 194 A.2d. 423 (1963) the defendant was convicted. There, the Court spoke of the effect of an acquittal, concluding that Pennsylvania has consistently followed the rule that a criminal judgment is not admissible as evidence to prove that the defendant did not do the act complained of. This is based on the difference in the quantum of proof between a civil and criminal case. Finally, appellant cites *Jordan vs. Gore*, 288 Pa. Super. Ct. 86, 431 A.2d. 300 (1981). There, a criminal action for support had been nolle prossed due to the failure of the mother of a child born out of wedlock to appear. This was used by a lower court to dismiss a civil action for the same support. This was reversed on appeal concluding that it was neither double jeopardy, res judicata or collateral estoppel and held that an acquittal does not even constitute evidence of innocence in the civil action.

Further, acquittal in criminal cases has been denied as a defense in civil cases where the criminal charge was that of a form of theft. A verdict of not guilty for receiving stolen goods is no bar to a subsequent action by the owner against the defendant for the price of the same. *Rohm vs. Borland*, 4 Sad. 319, 7 A. 171 (1886); *Hutchison vs. Bank of Wheeling*, 41 Pa. 42 (1861). WHEREFORE, the Court did not err in ruling that the prior acquittal of appellant could prevent the introduction of evidence concerning the activities of and his employees at the Allegheny County Coroner's Office for PP&TL.

XXII. DID THE COURT ERR IN REFUSING OR MODIFYING PROPOSED FINDINGS OF FACTS 15, 29, 41, 61, 77, 90, 97, 98, 99, 107, 110, 112, 116, 126 and 148?

The law is very clear that an appellate court cannot accept findings or statements of fact by the lower court for which there is no support in the record on apppeal. *Hosfeld Estate*, 412 Pa. 156, 192 A.2d. 158 (1963), on remand 414 Pa. 602, 202 A.2d. 609 (1964). Findings of fact may, however, [81] be based on proved facts or inferences therefrom. *U. S. Gypsum Company vs. Birdsboro Steel Foundry and Machine Company*, 160 Pa. Super. Ct. 548, 52 A.2d. 344 (9470), appeal transferred from 355 Pa. 653, 50 A.2d. 666 (1947).

Appellant argued that, ". . . the only evidence received upon these matters consisted of the evidence *supporting*

Defendant's proposed findings."[32] This is not correct as is demonstrated by a review of each finding.

Appellant first contended that the modification of his Proposed Finding of Fact 15 was in error. This finding, as modified reads,

> "Drs. Hunt, Wecht, and Winek decided that the funds received for out-of-county professional services would be deposited into a checking account at Mellon Bank to be used for professional and educational purposes."[33]

Appellant, while being questioned by his counsel, testified that,

> "I recall Dr. Hunt having told Dr. Winek and me that he had obtained legal advice, a legal opinion, and that we could do this, and that we would do it, and that anything that we wanted to do, if we wanted to, of an extra nature that we would set up this fund.
>
> "He never ordered us to do these things, but he said if you want to do them, and we have these requests coming in from out of county coroners and out of county hospitals, then go an (sic) ahead and do them and we can put the money into this Professional Education Fund."[34]

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[32] Appellant's Brief in Support of Exceptions, p. 55.

[33] As in the initial Opinion, that which has been added is underlined, and that which has been removed is in parenthesis.

[34] Trial Transcript, Volume 5, p. 73.

[82] Further, appellant testified to the genesis of the PEF stating,

> "The concept of the Professional Education Fund as far as I know, was essentially his [Dr. Hunt's] idea. There may well have been—and there probably were—there had to have been—some discussions with Dr. Winek and me, as we were the ones who were going to be doing all the work that would bring in this money for the cases that have nothing to do with the coroner's office."[35]

Finding 29, affirmed as modified, states

> "During *the years of 1968 through 1970* (all of the time that he was a Commissioner of Allegheny County) Dr. Hunt knew that the Coroner of Allegheny County maintained a Professional Education Fund into which he deposited proceeds from out-of-county coroners and hospitals and from which he disbursed funds for professional education and training as well as to supplement professional and para-professional salaries, to purchase equipment and supplies, and to pay memberships to professional organizations and to purchase professional publications."

This matter was dealt with previously in Point XIV of this Opinion. The only physical evidence concerning knowledge by Dr. Hunt was Exhibit M dated January 14, 1969. The exhibit consists of a statement by a supplier of books from New York City for reprints of an article by Dr. Winek, and was approved by the then Coroner, Dr. Stalter, for payment. On an Allegheny

[35] Trial Transcript, Volume 7, p. 153.

County Memo, Dr. Hunt responded to Dr. Stalter, "Don't you have a book or educational account over there that this should come out of?" There is no further physical [83] evidence to indicate that Dr. Hunt knew what occurred concerning payment of this claim of $120.84.

In the Trial Transcript, Volume 4, page 91, appellant stated that he had a "vague recollection" and later a "slight recollection," that he might have made reference in private discussions to the P.E.F., especially with Dr. Hunt as a county commissioner, but he stated, "That is vague." The Court does not take this testimony to be sufficiently definitive to permit the finding requested by appellant. The subject was again brought up in the Trial Transcript, Volume 4, Pages 110-1, where appellant reaffirmed a "vague recollection" of speaking to Dr. Hunt concerning supplemental incomes and professional activities. At best, his recollection was of a "kind of offhand remark."

Appellant's Proposed Finding of Fact 41 was affirmed as modified. It reads,

> "During his administration as Coroner, the performance of autopsies and histologies for out-of-county coroners and toxicology for out-of-county hospitals greatly expanded *in part* because of the expertise and reputation of Dr. Wecht relative to the autopsies and histology and Dr. Winek relative to the toxicology."

This Court did not affirm without modification the Proposed Finding because appellant, along with Dr. Winek, wished to take all the credit for the greatly

expanded autopsy, histology/toxicology work that was done for out-of-county coroners and hospitals. Appellant introduced into evidence [84] Exhibit MM. This purports to be a letter, but may be a press release, from Leo M. Bacha, Coroner of Westmoreland County, "To Whom It May Concern." Therein, Bacha stated that he had referred cases not only to appellant but also to appellant's professional colleagues because of "their acknowledged highly specialized skills, experience, and expertise in their field of forensic pathology and toxicology." Bacha concluded that his people knew that they could call upon ". . . Dr. Wecht and his medical staff seven days a week, on any holiday and at any time of the day or night." Certainly, by this letter the staff must be given some credit for the improvement at the Morgue. But further, many of the improvements were as a result of monies approved for expenditure by the County Commissioners from the County Treasury. Thus, some of the credit must then be given to the foresight of the Commissioners for permitted the development of the Coroner's Office.

Appellant's Proposed Finding of Fact 61 was refused in its entirety. That Finding reads,

> "(The Commissioners of Allegheny County during the 1970s knew or should have known that the Allegheny County Coroner's Office was performing services for out-of-county coroners and hospitals.)"

This matter was previously discussed in Point XIV of this Opinion.

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In the Trial Transcript, Volume 4, pages 91, 110-1, appellant testified that he had a vague recollection of [85] possibly mentioning the PEF in private discussions with Dr. Hunt when he was trying to get more money in 1972 for Morgue employees. However, he acknowledged that this was "vague," and that it certainly was not of a formal nature. Again, we conclude this was insufficient evidence from which to make such a finding.

Robert N. Peirce, Jr. was a County Commissioner from 1976 to 1980. During that period, Dr. Hunt was not on the Board of Commissioners. Peirce was specifically asked, in the Trial Transcript, Volume 7, page 186, whether he was "aware, from any source, that Dr. Wecht's private lab was receiving services performed at the Allegheny County Morgue." He answered with an unequivocal "No." Peirce did acknowledge that he knew the out-of-county autopsies were being performed because of some references to them in the newspapers, but he assumed that the proceeds were being deposited in the Allegheny County Coroner's account, as would any other revenue coming into Allegheny County.

Appellant excepted to the refusal of his Proposed Finding of Fact 77 which reads,

> "(Toxicology services rendered for a fee for in-Allegheny County hospitals produced approximately $500,000.00 income to the County of Allegheny during the ten year period Dr. Wecht was coroner, prior to Dr. Hunt's administration no fees were generated for Allegheny County for any services by ACCO.)"

The Court refused this point because of the uncertainty in the testimony. In the Trial Transcript, Volume 2, pages [86] 103-4, Dr. Winek testified and was asked if the revenues would be a very significant figure, and he responded that he thought so. Winek was then asked if he had any idea how much it would add up to, and he responded, "Oh, maybe over half a million dollars, I would say." Asked if that was for a year, and he responded, "Oh, not a year. I have never seen figures on that. I don't know if there would be a way of distinguishing. It would all be fees from the coroner's office. I don't know if there is a way of determining that."

To demonstrate the weakness of the testimony even further, on cross-examination by appellant's counsel, Trial Transcript, Volume 2, page 152, it was assumed in the question that the witness had testified that in some years his department earned $500,000.00 for doing work for hospitals in Allegheny County. To this the witness, Winek, responded, "That is correct, yes." This was contrary to his previous uncertainty and inability to determine what figures were proper for monies derived by his toxicology department. Therefore, the Court did not regard the testimony as having a sufficient basis to be accepted.

Appellant excepted to the refusal of Proposed Finding of Fact 90, which reads,

> "(A relatively small percentage of the business of PP&T was the processing and diagnosis of surgical specimens known as histo-pathology.)"

[87] Although Exhibits 58, 59 and 60 are a listing of the tissue that was sent by West Allegheny Hospital, Podiatry (formerly Doctor's Hospital), and private physicians to PP&TL, there was no breakdown as to the number of slides that were in fact sent by PP&TL to ACCO for histology work. Nor does a review of the evidence demonstrate that at any time a percentage or a "small percentage" was in fact sent to ACCO as opposed to being done at PP&TL. This Court waited expectantly while the testimony unfolded to learn the volume of business done by PP&TL, but it was never produced. WHEREFORE, there is no basis for accepting appellant's Finding of Fact 90.

Appellant's Proposed Finding of Fact 97, affirmed as modified, reads,

> "*Among* his reasons for doing this were that he could avoid a second trip to PP&T during the course of the day which took him away from the Coroner's Office for a longer period than he desired to be away, and to have surgical specimens available to be studied by himself, his fellow staff pathologists, and the resident pathologists he hoped to have in his residency program shortly."

This point was referring to why appellant decided to have most of the histology work, involving the preparation of slides, for PP&TL done at the Allegheny County Coroner's Office. This subject was previously dealt with in Point III of this Opinion. We have reviewed the testimony concerning his activities and why he commenced having histology done at ACCO and reaffirm

our conclusion that the reasons advanced [88] in Finding 97 were only some, and therefore, we inserted the work "among." Certainly having the work done by ACCO personnel at the Morgue, appellant was saving himself and his company money in time and use of equipment.

Appellant excepted to the refusal of Proposed Finding of Fact 98 and the affirmation of Proposed Finding of Fact 99 as modified. Both dealt with the same subject. Finding 98 reads,

> "(At about the same time, Dr. Wecht resigned a $30,000 per year part-time staff pathologist appointment at St. Clair Memorial Hospital located in Mount Lebanon Township, a suburb of Pittsburgh.)"

Finding 99, as modified, reads,

> "Dr. Wecht *resigned his position as part-time staff pathologist at St. Clair Memorial Hospital* (from his lucrative position) in order to devote more time to the office of Coroner of Allegheny County."

An examination of the record indicates factual support for Findings 98 and 99 as filed. The reason for the refusal of Finding 98 was its immateriality to the issue of the case. Appellant submitted his name to the electors of Allegheny County for the position of Coroner. With that came certain responsibilities. If he felt that he could better serve in his position of Coroner by giving up his previous employment, that was entirely his business and has nothing to do with his establishing the PEF for his sending specimens from PP&TL to ACCO for analysis.

Appellant excepted to the Court's refusal of Proposed [89] Finding of Fact 107. It reads,

> "(The processing of the PP&T specimens with the autopsy tissue incurred no additional expense to ACCO; nor did the processing of the PP&T tissue depreciate or cause wear to the histology laboratory equipment.)"

The principal witness for appellant in support of his mathematical conclusion that there was no additional cost to the county for the processing of the PP&TL specimens with the autopsy tissue was Dr. James A. Rock.[36] However, in this Court's opinion, Dr. Rock began with a false premise; that because the facilities were available and paid for by the County, whether they were used or not, there was no additional expense to the County for their use by appellant. He analogized to a toll bridge noting that the cost was fixed whether a person used it or not. He also accepted the analogy advanced by appellee's counsel, that of the Pennsylvania Turnpike. To state that there is no wear and tear on equipment by additional use cannot be accepted by this Court as being within common sense and logic.

Second, the County is entitled to be compensated for the value of the space and equipment and personnel which are used, whether it is an additional cost to the county or not. A fair rental or cost for services rendered by employees of ACCO should be paid and the surcharge was designed to reflect that.

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[36] Trial Transcript, Volume 12.

Appendix C—Opinion and Order En Banc of the Court of Common Pleas of Allegheny County.

Appellant excepted to the Court's refusal of Proposed [90] Finding of Fact 110 and the affirmation as modified of Proposed Finding of Fact 112. Finding 110 reads,

> "(The examination of the PP&T tissue slides by resident pathologists or staff pathologists at ACCO provided nothing of value to PP&T or Dr. Wecht.)"

An examination of the testimony disclosed that PP&TL slides were viewed, at times, both by residents and staff pathologists. If Dr. Perper were available, he would look at the slides and if both appellant and Dr. Perper was absent, another pathologist would be asked to look at the slides. That pathologist would not be paid additional compensation.[37] Therefore, this Court cannot conclude that there was nothing of value provided to appellant or PP&TL. Nor does the record support that examination of the slides were done by the pathologists on their own time or as an employee of PP&TL. As to the surgical specimens of PP&TL, it appears that they were read by the pathologists either in the later mornings or early afternoons.[38]

Appellant excepted to the modification of Proposed Finding of Fact 116, which reads,

> "Dr. Wecht *submitted a 'Tissue Request' into evidence showing the name* (operated) Cyril H. Wecht *and* Pathology Associates, *1400 Center Avenue, Pittsburgh, PA* (since 1974, including histopathology, testing and diagnosis of surgical specimens.) *He submitted no other evidence concerning trading under such a name.*"

[37] Trial Transcript, Volume 7, p. 117.

[38] Trial Transcript, Volume 6, pp. 18-20.

Appendix C—Opinion and Order En Banc of the Court of Common Pleas of Allegheny County.

An examination of the record shows that a tissue request, [91] Exhibit OOO, was introduced into evidence as being similar to the tissue requests that came from PP&TL.[39] This particular Exhibit shows the name of the company as "Cyril H. Wecht and Pathology Associates, Inc., 1400 Centre Avenue, Pittsburgh, Pennsylvania 15219." The testimony also disclosed, that after the sale of PP&TL, appellant continued to examine surgical tissues from Podiatry Hospital under the name, "Cyril H. Wecht Pathology Associates."[40] This Court did not intend to imply that appellant was not doing business as a "viable entity" as suggested by appellant's exception 101.

Appellant excepted to the refusal of Proposed Finding of Fact 126 which reads,

> "(In order to examine specimens and slides at CMP, the ACCO pathology residents and the Chief Forensic Pathologist and Dr. Wecht would have been required to become members of the staff of that hospital and to leave ACCO to travel to and from the hospital for such examinations."

This subject was dealt with in Point XVII of this Opinion.

The method used by Dr. Michael Baden was dealt with in the previous section of this Opinion. Dr. Robert Stein of Chicago paid $100.00 per month to the "Illinois Registry of Pathology" to have a series of twenty slides

[39] Trial Transcript, Volume 13, p. 105.

[40] Trial Transcript, Volume 8, p. 193.

plus clinical history sent to him for study.[41] There is no evidence that this same service could not be used by the Allegheny [92] County Coroner's Office.

Even appellant acknowledged that on occasion, slides would be brought in from different hospitals by some of the pathologists on the staff and on a regular basis, they would get slides sent from the Pittsburgh Pathology Society. Finally, on occasion they would get slides from the Armed Forces Institute of Pathology.[42] WHEREFORE, we see no error in the refusal of this point.

Finally, appellant excepted to the refusal of Proposed Finding of Fact 148, which reads,

> "(Dr. Wecht's private autopsies were scheduled for periods that would not interfere with the performance of the jurisdiction autopsies at ACCO.)"

Although the contention of the appellant is that the performance of the private autopsies did not interfere with ACCO's regular business, the Court concluded to the contrary based on Exhibit 57, and the testimony of appellant who was asked to make a summarization of the starting times of private autopsies.[43] From those sources we learned that ten private autopsies were commenced between 8:00 and 10:00 a.m.; 23 were started between 10:00 a.m. and noon; 11 between noon and 2:00 p.m.; 13

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[41] Trial Transcript, Volume 11, p. 101.

[42] Trial Transcript, Volume 6, p. 169.

[43] Trial Transcript, Volume 13, pp. 122-25.

between 2:00 and 4:00 p.m.; and 4 between 4:00 and 6:00 p.m. One was started after 6:00 p.m. and ten were unlisted as to the beginning time. To conclude, as appellant would request in Proposed Finding of Fact 148, [93] that the private autopsies did not interfere with the performance of the jurisdictional autopsies, would appear to be contrary to what would be expected considering that 1,000 or more jurisdictional autopsies per year were performed at ACCO.

[94] *AMENDED VERDICT*

AND NOW, on this 8th day of September, 1983, we find a Verdict in favor of Allegheny County and against Dr. Cyril H. Wecht as to the Lynch Surcharge in the principal amount of $195,389.00, with interest from October 29, 1979, to May 10, 1983, in the amount of $41,368.93, for a total of principal interest of $236,757.93.

We do further reaffirm the previous Verdict of this Court of May 10, 1983, in favor of Allegheny County and against Dr. Cyril H. Wecht as to the Lucchino Surcharge in the principal amount of $13,254.81 plus interest from May 2, 1980, to May 10, 1983, in the amount of $2,403.29, for a total of $15,658.10.

The total Verdict rendered against the appellant, Dr. Cyril H. Wecht, is in the amount of $252,416.03.

BY THE COURT:

ALBERT E. ACKER *J.*
Albert E. Acker, *Judge*

ALFRED T. WILLIAMS, JR. *J.*
Alfred T. Williams, Jr., *Judge*

APPENDIX D

Adjudication of the Court of Common Pleas of Allegheny County, Pennsylvania

IN THE COURT OF COMMON PLEAS
of Allegheny County, Pennsylvania

CIVIL DIVISION

No. Misc. 11 April Term 1979
Issue No. 118979

No. GD80-2600
Issue No. 118979

IN RE: ALLEGHENY COUNTY CONTROLLER'S AMENDED ANNUAL REPORT 1967-1978

AND

IN RE: ALLEGHENY COUNTY CONTROLLER'S 1979 ANNUAL REPORT.

ADJUDICATION Consisting of:
DISCUSSION, FINDINGS OF FACT,
CONCLUSIONS OF LAW, VERDICT

Filed by ALBERT E. ACKER, *J.*
Specially Presiding

Appendix D—Adjudication of the Court of Common Pleas of Allegheny County, Pennsylvania.

Counsel of Record for Frank J. Lucchino,
Controller of Allegheny County:

Byrd R. Brown, Esquire
Doris A. Smith, Esquire
Louis S. Gold, Esquire
104 Courthouse
Pittsburgh, PA 15219

Counsel of Record for Dr. Cyril H. Wecht,
former Coroner of Allegheny County:

David J. Armstrong, Esquire
Richard C. Polley, Esquire
Dickie, McCamey & Chilcote
3180 U. S. Steel Building
Pittsburgh, PA 15219

[1] *ADJUDICATION*

We make this detailed Adjudication because both parties to the Surcharge have requested it, and because of the prominent positions held by Commissioner Wecht and Controller Lucchino in the government of Allegheny County.

This Adjudication is in three parts. They are:

1. Discussion—designed for the lay person (pages 2 through 9), followed by the Verdict (pages 10 through 11), with detailed footnotes as to the law (pages 12 through 16).

2. Findings of Fact based on proposed findings of the Controller (pages 17 through 27), findings by the Court as to fraud (pages 28 through 31), and proposed findings of the defendant (pages 32 through 48).

3. Conclusions of law. This is a condensation of the law which was applied to the facts in the Discussion and in arriving at the Verdict (pages 49 through 51).

The Adjudication deals with two surcharges. The first was filed by former Controller John Lynch for the years of 1970 through 1978. The second was filed by the present Controller, Frank J. Lucchino, for activities at the Allegheny County Coroner's Office from February through July of 1979. We find merit in both surcharges.

[2] *DISCUSSION*

The Surcharges for determination were filed by John Lynch, then Controller, against Cyril H. Wecht, the former Coroner, for the years of 1970 through 1978, and by Frank J. Lucchino, the present Controller, for the period of February 5, 1979, to July 18, 1979.

The sources of money which are the subject of the surcharges are:

1. Professional Education Fund, also known as "PEF," which relates to autopsies performed for Coroners outside of Allegheny County and for lab work, known as toxicology, performed for hospitals outside of Allegheny County. All monies collected

for these services went into accounts in the name of Cyril H. Wecht, M. D. in the Mellon National Bank. Monies collected for in-county autopsies and lab work were properly paid over to Allegheny County.

2. Pittsburgh Pathology and Toxicology Laboratory which relates to examination of surgical tissues by Morgue employees on County time with County equipment.

3. Private autopsies which relate to autopsies performed on the Morgue premises as part of Dr. Wecht's private medical-legal consulting practice.

4. Medical-legal consulting fees for work obtained by Dr. Wecht in his private medical-legal office for attorneys representing the families of deceased persons or other parties having an interest in a case arising from the death of an individual.

[3] The starting point in our determination is whether the activity of Dr. Wecht was against the law as to any or all of the above types of work. We conclude that it was except as to his medical-legal consultations which were not done through the Coroner's Office.

It is important to know what a Coroner is supposed to do under the law.[2]

The Coroner is required to accept bodies which are unclaimed and perform an autopsy on them if he thinks it is necessary. He must view the body, and investigate the facts concerning death in the following cases:

1. Any sudden,[3] violent or suspicious death within Allegheny County.

2. Any death where there is no proper certification as to the cause of death by a person authorized to do so.

3. A death resulting from a mine accident.

4. A death from drowning, cave-in, or subsidance.

5. Stillbirth or a death of a baby within 24 hours of its birth.

6. The death of a prematurely born infant where the cause of death is not properly certified.

Such cases are known as Jurisdictional cases. There is no specific provision for a Toxicology Lab as a part of the Coroner's Office.[4]

The law comes to us through our Constitution, Acts of the Legislature and decisions of our Courts. The Constitution[5] tells us that "County Officers shall be paid only by salary as provided by law for services performed for the County or any other governmental unit. Fees incident to the conduct of any County office shall be paid directly to the County."

By a statute which became effective in the first year of the surcharge, [4] County Officers were to be paid only the salary provided therein for services performed for the County and all fees and commissions received in the conduct of any County office were to be paid directly to the County.[6] Indeed, Dr. Wecht and every County Officer must declare as a part of his oath upon taking office that he will not knowingly receive, directly or

indirectly, any monies or other valuable things for the performance or non-performance of any act or duty pertaining to the office other than that allowed by law.[7]

Our Courts have held that even if a County Officer receives a salary in good faith based on a statute which is subsequently declared unconstitutional, the money must be paid back for there is no inherent right to keep additional compensation because such an officer is entitled only to the salary expressly authorized by statute.[8]

A fee has been defined as, "A compensation for service rendered, especially professional service."[9] This well defines the monies involved in the surcharges.

This very case was before the Commonwealth Court of Pennsylvania in 1981.[10] That Court had to decide whether to follow the same argument made in the trial of this case. That argument goes that because there is no allowance in law to do out-of-county autopsies or pathology work, there can be no requirement by law to account for the monies received. In disposing of that contention against Dr. Wecht and his two predecessors, the Court held, ". . . . that the Coroners were obligated to report receipt of funds to the County through the Controller and that the surcharges filed by the Controller are the proper avenue to relief."[11]

Our Courts tell us that the rule must be that "[T]he public interest must not be jeopardized by the acts of a public official who has a direct pecuniary [5] or personal or private interest which is, or may be, in conflict with the public interest."[12] Our Courts also remind us of

something which we all know, that is, "[W]e are all best served by the continual awareness that we are subject to a government of laws and not of men."[13]

There can be no question that Controllers Lynch and Lucchino acted properly in instituting the surcharges in this case. Indeed, if they failed to do so, they would have been derelict in their duty.[14]

The defense responds that even if the Coroner's activities were illegal, he should not be surcharged. He contends that whatever acts he may have performed did not involve fraud or collusion.[15]

The defense contends that because there is no showing of fraud or collusion, that portion of an Act passed by the Legislature in 1945 must be applied to prevent the Surcharge. Although argued by the Controller that there is collusion, this Court finds no evidence to establish it. Whatever Dr. Wecht did, we believe it was on his own volition without the knowing joinder of third persons. There is evidence from which a person could question whether there was fraud; such as to the failure of Dr. Wecht to report to the Controller the existence of the Mellon Bank accounts which were solely in his own name and control, and where he placed the money received from out-of-county autopsies, and lab work. This failure to report was after a specific request was made in writing by Controller Lynch. The deliberate failure to disclose a material fact can be a fraud[16]. Dr. Wecht testified that he relied upon his attorney to prepare the responding letter. We accept that testimony.

The matter of fraud is not without doubt, but the Controller did not [6] furnish the clear, convincing, precise and direct evidence required under our law.[17]

Appendix D—Adjudication of the Court of Common Pleas of Allegheny County, Pennsylvania.

In order to relieve the harshness of a surcharge the legislature limits the Courts from holding a county official financially responsible for his acts over and above the actual financial loss to the County. The Court must consider, as the basis of the Surcharge, the results of Dr. Wecht's acts had they been done strictly according to law.[18]

We believe that Dr. Wecht lawfully could have performed autopsies and done toxicology and histology work for Coroners and hospitals outside of Allegheny County had he obtained the permission of the County Commissioners. If he had received permission from the Commissioners, however, they would have been required to demand that the fees for the services be turned in to the County Treasurer. Similarly, he could have received County Commissioners' approval for private autopsies, but the Commissioners would have been required to demand payment for the use of the facility. We do not believe that he was required by law to receive the County Commissioners' approval for medical-legal consulting fees[19] which were not connected with the Morgue.

Even if the County Commissioners accepted Dr. Wecht's contention that running tests for Pittsburgh Pathology and Toxicology Laboratory benefited the Morgue, they could not have entered into a contract with Dr. Wecht,[20] but had they done so, at the least, payment would have been required for Pittsburgh Pathology and Toxicology Lab's use of County personnel and facilities.

Appendix D—Adjudication of the Court of Common Pleas of Allegheny County, Pennsylvania.

The Act of 1945 relied upon by Dr. Wecht was repealed on January 25, 1979.[21] Therefore, it is no defense to the second, or Lucchino, Surcharge that the [7] that the County may have received any benefit from Dr. Wecht's actions.

Effective January 1, 1979, the legislature passed a new statute dealing with conflict of interest.[22] Under this Act Dr. Wecht was unquestionably required to turn over all monies received through activities at the Morgue.

We conclude that there was some benefits through experience gained to Morgue personnel to the County of Allegheny by the performance of the out-of-county and private autopsies and toxicology work and the private autopsies. We do not see any substantial benefit to Allegheny County for the examination of surgical tissue by Morgue employees from Dr. Wecht's private laboratory, known as Pittsburgh Pathology and Toxicology Laboratory. Such tissue, if necessary, could have been acquired from other sources, with minimal effort by Dr. Wecht. The examination of surgical tissue done at the Morgue for Pittsburgh Pathology and Toxicology Laboratory was carried on prior to the beginning of the residency program, as well as after the termination of the program, and was part of a money-making business owned by Dr. Wecht.

Dr. Wecht argued that reading Pittsburgh Pathology and Toxicology Laboratory slides, performing out-of-county and private autopsies was required to train and maintain the proficiency of the Morgue staff. This argument loses much of its initial appeal when we learn Dr. Wecht openly solicited out-of-county Coroners after

he left office and retained much of that business privately. Further, he no longer sends surgical slides to the ACCO toxicology lab. Indeed, he has participated as a County Commissioner in voting for the removal of the toxicology lab from the control of the Coroner. Both Dr. Wecht and his eminent Forensic Pathology colleague, Dr. Stein, Chief Medical Examiner of Cook County, Illinois, [8] testified as to the importance of having a first rate toxicology laboratory in the Coroner's Office.

Wherefore, Dr. Wecht's conduct after he left the Coroner's Office minimizes the weight this Court initially placed upon his testimony.

After a thorough consideration of the facts and the law, we find the first Surcharge to be in the amount of:	$129,863.37
We find the total of the Second Surcharge to be:	13,254.81
for a Total Surcharge of:	$142,618.18
We find the total interest from the first Surcharge from the date of its filing of October 29, 1979 to May 10, 1983, to be:	$ 27,389.52
We find the interest on the Second Surcharge computed from May 2, 1980 through May 10, 1983, in the amount of:	$ 2,403.29
for a Total Interest of:	$ 29,792.81
The Total of the Two Surcharges and Interest for both Surcharges, is in the amount of:	$172,410.99

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These figures are arrived at as follows:

As to the first Surcharge for out-of-county autopsies and related services and out-of-county toxicology and histology testing done at the Allegheny County Coroner's Office, we find:	$143,615.00
As to the Surcharge as to monies received by Dr. Wecht for services performed by employees of the Allegheny County Coroner's Office for private testing of materials from Dr. Wecht's Laboratory known as PP&T, we find:	$ 58,954.00
As to 72 private autopsies done at the Allegheny County Morgue on a rental basis for the facilities per autopsy, we find:	$ 3,600.00
TOTAL	$206,169.00

[9] From the above total as to the first Surcharge, only credit must be given to Dr. Wecht for monies expended by him from his Mellon Account which benefitted the Allegheny County Coroner's Office. Such credits must be used to reduce the first Surcharge to arrive at the actual loss to Allegheny County. Therefore, for supplemental salaries to obtain certified Forensic Pathologist, Dr. Perper, now the Coroner, and to supplement salaries of residents in training at the Coroner's Office, membership dues in some medical organizations, for trips for educational purposes within the United States, but not overseas, for books and periodicals, supplies and equipment, we give a credit of $76,805.63.

Nearly $61,000.00 of the $76,805.63 represents monies for salaries. An additional $9,300.00 represents monies paid for periodicals, supplies and equipment.

There is no allowance for membership in non-medical organizations, political contributions, meals, overseas trips, parties, flowers, and other similar categories found in the accounting of the Professional Education Fund.

The Second Surcharge for the period of February 5, 1979, to July 18, 1979, is in the amount of $13,254.81.

There is no surcharge against Dr. Wecht for monies he received for private counseling cases unrelated to his position as Coroner of the Morgue.

HENCE, THIS VERDICT:

[10] *VERDICT*

AND NOW, on this 10th day of May, 1983, we hereby find in favor of Allegheny County, and against Dr. Cyril H. Wecht, as to the first Surcharge, in the principal amount of $129,363.37 with interest from October 29, 1979, to the date of this Verdict in the amount of $27,389.52, for a total of principal and interest of $156,752.89.

We do further find a Verdict in favor of Allegheny County, and against Dr. Cyril H. Wecht as to the second Surcharge in the principal amount of $13,254.81 plus interest from May 2, 1980, to the date of this Verdict in the amount of $2,403.29 for a total of $15,658.10.

Within ten (10) days after notice of the filing of the decision, exceptions may be filed by any party to the decision or any part thereof, to rulings on objections to

evidence or to any other matters occurring in the trial. Each exception shall set forth a separate objection precisely and without discussion. Matters not covered by exceptions are deemed waived unless, prior to final judgment, leave is granted to file exceptions raising these matters. No motion for new trial, for judgment n.o.v., in arrest of judgment, or to remove a non-suit may be filed.

The Prothonotary shall, on praecipe, enter final judgment on the decision if no exceptions have been filed within the ten-day period, or a waiver in writing of the right to file exceptions signed by all parties has been filed, all being pursuant to Pa. R. C. P. 1038(d)(e).

[11] The Prothonotary shall immediately give written notice by ordinary mail to each party or to his attorney of record of the entry of the final judgment, or of any other Order of the Court.

BY THE COURT:

ALBERT E. ACKER *J.*
Albert E. Acker, *Judge*
Specially Presiding

Appendix D—Adjudication of the Court of Common Pleas of Allegheny County, Pennsylvania.

[12] *FOOTNOTES*

[1] This matter is decided pursuant to Pa. R. C. P. 1038(b).

[2] Act of 1953, July 28, P. L. 723, art. XII, §§1233 and 1236 [16 P. S. §§4233 and 4236].

[3] By the Act of 1953, July 28, P. L. 723, art. XII, §1238 [16 P.S. §4238], a sudden death is defined as one which occurs without prior medical attendance by a person lawfully authorized to make certificate of death, the defendant was discharged from such medical attendance, there was a change of medical attendance, or if such medical attendance began within 24 hours of death and the medical attendant refused or was unable to certify the cause of death.

[4] This Court through Papadakos, J., acting as Chancellor in *Perper vs. Hunt et al*, GD82-00470, held that the Coroner has no statutory right to maintain a Toxicology Division independent of the control of the County Commissioners. The toxicologists are not Deputy Coroners, the Coroner has no statutory right to a Toxicology Department and no County staff officer, including the Coroner, may expand its facilities to embrace duties not specifically authorized by statute without the express approval of the Board of County Commissioners.

[5] The Constitution of Pennsylvania, Article IX, §4. This Article became effective immediately on the date of its approval, by the electorate, on April 23, 1968. Purdon's—Constitution, Article IX, Schedule. *City of Greensburg, Hempfield Township, Westmoreland County*, 217 Pa. Super. Ct. 439, 272 A.2d. 729 (1970). Although county officers are listed in Article IX, §4 of the Constitution, coroners are not included. It is, however, provided that in addition to the county officers listed, there are to be included ". . . such others as may from time to time be provided by law." *Commonwealth ex rel. Foreman vs. Hampson*, 393 Pa. 467, 143 A.2d. 369 (1958). The subject is discussed generally in PLE Coroners §1. Coroners became county officers by the Acts of 1955, Aug. 9, P. L. 323, §401; as amended 1968, No. 26, P. L. 1099, No. 341, §1 [16 P.S. §401] and 1953, July 28, P. L. 723, art. IV, §401; as amended 1968, Nov. 27, P. L. 1114, No. 346, §1 [16 P. S. §3401]. By the Act of 1971, Nov. 1, P. L. 495, No. 113, §10.1, added 1979, Nov. 1, P. L. 246, No. 82, §2 [16 P.S. §11011-10.1], County Commissioners were given the power to fix the salaries of county officers.

[13] [6] Act of 1971, Nov. 1, P. L. 495, No. 113, §12, immediately effective [16 P. S. §11011-12]. The Coroner is regarded as a County Officer in *Bakes vs. Snyder*, 486 Pa. 80, 403 A.2d. 1307 (1979). Further, our Supreme Court in *Simon vs. County of Allegheny*, 87 P.L.J. 317 (1939) aff'd 337 Pa. 436, 11 A.2d. 868 (1940) held that salaries can be legally set and changed only by compliance with the statute.

[7] Act of 1953, July 28, P. L. 723, art. IX, §403 [16 P.S. §3403].

[8] *County of Allegheny vs. Grier*, 179 Pa. 639, 36 A.353 (1897). Nor may a public officer claim additional compensation for discharge of duties although those duties are increased without a corresponding increase in the salary or fees payable to the county officer. *Lawson vs. Allegheny County*, 326 Pa. 243, 191 A. 600 (1837).

[9] *City of York vs. Reinhart*, 475 Pa. 151, 379 A.2d. 1328 (1977).

[10] *In Re: Controller's Subpoena, etc.*, 62 Pa. Commw. Ct. 58, 434 A.2d. 1323 (1981).

[11] 62 Pa. Commw. Ct. at 62; 434 A.2d. at 1325. The defendant argues that the quoted language is not controlling for the Commonwealth Court, upon application of the defendant, entered an amending Order stating, "Nothing in this Court's Opinion and Order filed September 25, 1981, shall prevent former Coroners Hunt, Stalter and Wecht from raising a *defense* at trial that the activities at issue were performed in an unofficial capacity. (Emphasis added.)" Regardless of the latter language, we are of the opinion that the Commonwealth Court did regard the activities as being potentially illegal and we regard them as illegal.

[12] *Genkinger vs. City of New Castle*, 368 Pa. 547, 84 A.2d 303 (1951).

[13] *Cotlar vs. Warminster Township*, 8 Commw. Ct. 163, 302 A.2d. 859, 862 (1973).

[14] Dr. Wecht had a monthly duty to pay to the Courts monies earned by his office. Act of 1953, July 28, P. L. 723, art. XVIII, §1802 [16 P. S. §4802].

[15] Act of 1945, May 15, P. L. 538, §2 [65 P. S. §192].

[16] *Shane vs. Hoffman*, 227 Pa. Super. Ct. 176, 324 A.2d. 532 (1974); *Eckrich vs. Dinardo*, 283 Pa. Super. Ct. 84, 423 A.2d. 727 (1980); 16 P.L.E. Fraud §5.

Appendix D—Adjudication of the Court of Common Pleas of Allegheny County, Pennsylvania.

[14] [17] *Davis vs. Carbon County*, 369 Pa. 322, 85 A.2d. 862 (1952) is a surcharge case construing 65 P.S. §§191 and 192 which are involved in this case. There, it is held, at page 868, that fraud must be established by direct proof or by facts clearly sufficient to warrant a presumption of its existence.

O'Callaghan vs. Weitzman, 291 Pa. Super. Ct. 471, 436 A.2d. 212, 215 (1981) requires clear and convincing evidence.

Carlson vs. Sherwood, 416 Pa. 286, 206 A.2d. 19 (1965) speaks of clear, direct, precise and convincing evidence while *Highmont Music Corporation vs. J. M. Hoffman*, 397 Pa. 345, 155 A.2d. 363 (1959) talks about "clear, precise and indubitable evidence." In *Gerfin vs. Colonial Smelting & Refining Co., Inc.*, 374 Pa. 66, 97 A.2d. 71 (1953), "clear, precise and indubitable" was defined as evidence from a witness who is credible, distinctly remembers the facts they testify to, and narrates details exactly. The evidence must be of such weight and directness as to make out the facts alleged beyond a reasonable doubt.

[18] Act of 1945, May 15, P. L. 538, No. 210, §1 [65 P. S. §191]. The Controller argues that this statute does not apply because none of the cases decided under the Act approach the factual situation of this case. The Controller is, in large measure, correct that none of the cases approach this factual situation. In *Appeal of Yenerall*, 165 Pa. Super. Ct. 144, 67 A.2d. 565 (1949) permitting a son-in-law of a Township Road Commissioner to use a truck financed by the Commissioner was held not to be grounds for a surcharge. The Court found that there was no fraud or collusion involved and the Township suffered no actual financial loss. In *Davis vs. Carbon County*, 369 Pa. 322, 85 A.2d. 862 (1952), it was held that the failure to obtain approval by the State Art Commission and the judges of the Court of Common Pleas for specifications and plans was not grounds to require a surcharge when there was no showing of fraud or financial loss. In a case decided under the Second Class Township Code, Act of 1933, May 1, P. L. 103, art. V, §545 as amended, Act of 1963, April 23, P. L. 25, §1; 1971, July 29, P. L. 255, No. 62, §1; 1981, Oct. 16. P. L. 291, No. 100, §1 [53 P. S. §65545], which is, in part, similar to the statute involved in this case, it was held the Township Supervisors should not be surcharged for their failure to act in strict conformance with law. Where the actual result of an act or an admission does not differ from the result which would have occurred had the act been

(Footnote continued on following page.)

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(Footnote continued from preceding page.)

carried out in strict conformance with law. A typical example is *Audit of the School District of Scranton (No. 1)*, 354 Pa. 225, 47 A.2d. 288 (1947) which, although decided prior to the effective date of Act of 1945, applied similar law through the application of §13 of the Act of 1931 which gave relief to School Directors if they acted "honestly and in good faith for the best interests of the school district, and where there was no loss or damage to the school district [15] resulting from the action." There, in the construction of a stadium, the school district avoided the advertising requirements by purchasing items in groups which had a value of less than $300.00. The surcharge for the construction of the stadium was dismissed.

[19] Doctors are not required by law in private cases to give their professional opinion concerning causation if they are not compensated for their services. There is a distinction between a witness called in criminal prosecution on behalf of the government and one called in a civil action. " 'The process of the Courts may also be invoked to require witnesses to appear and testify to any fact within their knowledge; but no private litigant has the right to ask them to go beyond that. The State or the United States may call upon her citizens to testify as experts in matters affecting the common weal, but that is because of the duty which the citizen owes to the government, and is an exercise of its sovereign power. So, also, where the State or the United States, in her sovereign capacity, charges the citizen with crime, she may, if need be, lend her power in that regard to the accused, for she is vitally interested, as such sovereign, that public justice shall be vindicated within her borders . . . But the private litigant has no more right to compel a citizen to give up the product of his brain than he has to give up materials things. In each case it is a matter of bargain, which as ever, it take two to make, and to make unconstrained.' " *Yerko vs. Clearfield Bituminous Coal Corp.*, 145 Pa. Super. Ct. 269, 277-8, 21 A.2d. 97, (1941) citing *Pennsylvania Co. for Insurance on Lives and Granting Annuities, Trustee vs. Philadelphia*, 262 Pa. 439, 441, 105 A. 630 (1918). See also *Evans vs. Otis Elevator Co.*, 403 Pa. 13, at 27, 168 A.2d. 573 (1961) and *Cold Metal Process Company vs. United Engineering and Foundry Co.*, 83 F. Supp. 914, (W.D. Pa. 1938), aff'd 107 F.2d. 27 (3d. Cir. 1949), and *Cohen vs. Continental Casualty Company*, 89 Pa. Super. Ct. 367

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(1926). In *Commonwealth vs. Higgins*, 5 Kulp. 269 (1889), a physician; at a Coroner's inquest was required to state his opinion as to the affect of medicines administered. Further, in *Diller vs. Crawford County*, 23 Dist. 551 (1913), an expert witness on insanity, employed by the District Attorney in a murder case, could not receive, without the authority of the County Commissioners, payment for his services in an amount greater than an ordinary witness would receive.

[20] No county official can be personally interested either directly or indirectly in any contract to which the County is a party. Act of 1955, Aug. 9, P. L. 323, §1806 [16 P. S. §1806]. *Kimball vs. Cambria County*, 36 D. & C. 2d. 662 (1965).

[16] [21] Repealed 1978, Nov. 26, P. L. 1399, No. 330, 902 effective in 60 days. Purdon's Annotated Supplement 1982-83, page 29 [65 P.S. 191].

[22] Act of 1978, Oct. 4, P. L. 883, No. 170, §1, [65 P. S. 401]. 65 P. S. §403(a) provides that, "No public official or public employee shall use his public office or any confidential information received through his holding public office to obtain financial gain other than compensation provided by law for himself, a member of his immediate family, or a business with which he is associated." This statute is therefore applicable to the Lucchino Surcharge and prevents the raising of any defense of benefit to the County by Dr. Wecht as to that surcharge.

It can be argued that because of the enactment of 65 P.S. §403 that 65 P.S. 191 is inapplicable to the first Lynch Surcharge. We conclude to the contrary on the authority of *Klug vs. Gazey*, 270 Pa. Super. Ct. 445, 411 A.2d. 802 (1979) and *Com., etc. vs. Pa. Engineering Corp.*, 54 Pa. Commw. Ct. 376, 421 A.2d. 521 (1980).

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[17] *FINDINGS OF FACT*

The Controller has submitted 92 Findings of Fact he wishes the Court to accept. The former Coroner has submitted 177 Proposed Findings of Fact. They are dealt with as follows:

If accepted without change, they are stated as submitted.

If they are refused in toto, the word "Refused" is first written, but the requested Finding is placed in brackets.

If the proposed Finding is modified or changed by the Court, the deleted words are in brackets ( ) and the added words are underlined.

In this manner the reader will better follow the thinking of the Court.

Therefore, anything in brackets was deleted and not considered, and anything underlined was added by the Court and is considered with the other language of the Finding.

We first consider the proposed Findings of the Controller.

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FINDINGS OF FACT AS SUBMITTED BY CONTROLLER

1. That Cyril H. Wecht, M. D. was the duly elected Coroner of Allegheny County, Pennsylvania, and served as Coroner of Allegheny County from January, 1970 to January, 1980.

2. Cyril H. Wecht, M. D., established on or about January 19, 1970, a checking account at Mellon Bank and Trust Company, Account #494-5044, titled "Cyril H. Wecht, M. D.," 542 Fourth Avenue, Pittsburgh, PA 15219.

3. That Cyril H. Wecht, M. D., established on or about February 5, 1974, a checking account at Mellon Bank and Trust Company, Account #400-8405, titled "Cyril H. Wecht, M. D.," 542 Fourth Avenue, Pittsburgh, PA 15219.

4. That on or about February 1979, Cyril H. Wecht, M. D., established a checking account at Mellon Bank, N. A., titled "Professional Education Fund," bearing account number 016-3483.

[18] 5. That 542 Fourth Avenue, Pittsburgh, PA 15219, is the address of the Coroner of Allegheny County.

6. That Defendant Wecht had control and authority over the Mellon Bank accounts referred to in Paragraphs 2 through 4, which authority included disbursements made from said accounts.

7. That Defendant Wecht, as Coroner of Allegheny County, directed and allowed the receipt of bodies for autopsies and toxicology specimens from out-of-county coroners, at the Allegheny County Coroner's Office.

8. Affirmed as modified. That the coroners of other counties which requested Defendant Wecht, as Coroner of Allegheny County, to provide certain services to them and the counties which made payment to Defendant Wecht as Coroner of Allegheny County included the following: Westmoreland, Fayette, Washington, Armstrong, Beaver, Butler, Erie, Greene, Mercer, Elk, McKean, Bedford, Clearfield, Clarion, Warren, Somerset, Clinton, Venango, Wayne, Indiana, Columbia, Northumberland, Bradford, (and) Cambria, and Lawrence.

9. That Defendant Wecht as Coroner of Allegheny County directed and allowed the performance of postmortem examinations and toxicology specimen testing for coroners of other counties to occur at the Allegheny County Coroner's Office by the employees of the County of Allegheny, using Morgue equipment, slides, and materials.

10. That postmortem examinations and toxicology testing for coroners of other counties occurred during the regular or normal work hours of the employees of the County of Allegheny at the Allegheny County Coroner's Office.

11. That revenue for out-of-county autopsies and related histology/toxicology testing, performed at the Allegheny County Morgue, as well as fees pertaining to activities such as depositions, court appearances, medical/legal reports, and consultations were deposited to the Mellon Bank accounts maintained by Dr. Wecht identified in Paragraphs 2 through 4.

12. That Defendant Wecht, as Coroner of Allegheny County, received fees from outside counties for services rendered at the Allegheny County Coroner's Office using Morgue employees, equipment, supplies, and materials.

13. That Defendant Wecht, as Coroner of Allegheny County, also accepted specimens for toxicology testing from hospitals located outside of Allegheny County.

14. Affirmed as modified. That the out-of-county hospitals for whom Dr. Wecht provided services at the Allegheny County Morgue from 1970 through 1978 are as follows: Citizen's General, Aliquippa, Washington, Beaver County Memorial, Somerset, Butler Memorial, Latrobe General, Canonsburg, Westmoreland, Conemaugh Valley, Bradford Memorial, Elkins Memorial (West Virginia), Altoona, Franklin, Bashline (Bashland) (Grove City), Indiana, Ellwood City, Armstrong, (Amstrong) Memorial, United Community (Unified) (Grove City), and St. Joseph's (West Virginia).

[19] 15. Sources of receipts deposited to Dr. Wecht's Mellon Bank account identified in Paragraphs 2 and 3 included, but were not limited to, fees received from out-of-county coroners and hospitals, attorneys, private individuals, businesses, and other political subdivisions outside of Allegheny County.

16. That revenue received from out-of-county coroners from March 6, 1974 through 1978 for autopsies and histology/toxicology testing performed at the Allegheny County Coroner's Office and for other services such as court appearances, etc. pertaining to those autopsies amounts to $101,415.

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17. That the 101,415 received from the out-of-county coroners for autopsies and histology/toxicology testing performed at the Allegheny County Coroner's Office, as well as for such services as court appearances pertaining to those autopsies, during the period of March 1974 through 1978, was deposited to Dr. Wecht's Mellon Bank account titled, "Cyril H. Wecht, M.D.," Account #400-8405.

18. That the revenue received from out-of-county hospitals from March 6, 1974 through 1978 for toxicology testing performed at the Morgue amounts to $31,420.

19. That the $31,420 received from out-of-county hospitals for the performance of toxicology testing at the Allegheny County Coroner's Office from March 6, 1974 through 1978, was deposited to Dr. Wecht's Mellon Bank account titled, "Cyril H. Wecht, M.D.," Account #400-8405.

20. That revenue received from out-of-county coroners in 1973, for autopsies and histology/toxicology testing performed at the Allegheny County Coroner's Office and for other services pertaining to same amounts to $10,780.

21. That the $10,780 received from out-of-county coroners for autopsies and histology/toxicology testing performed at the Allegheny County Coroner's Office, as well as for court appearances, etc., pertaining to same during 1973, was deposited to Dr. Wecht's Mellon Bank account titled, "Cyril H. Wecht, M.D.," Account #494-5044.

22. Affirmed as modified. That the net fees received by Dr. Wecht for services rendered to out-of-county coroners from 1970 (1973) through 1978 total $112,850.20 ($122,195).

23. Affirmed as modified. That the net fees received by Dr. Wecht for services rendered to out-of-county hospitals from 1970 (1974) through 1978 total $31,420.

24. That neither the County of Allegheny, body corporate or politic, nor its Board of Commissioners authorized the performance of postmortem examinations [20] including laboratory analysis, or toxicology specimen testing and related services for out-of-county coroners and hospitals to occur at the Allegheny County Coroner's Office, using morgue equipment, employees, facilities, supplies and materials.

25. Refused. (That the actual financial loss sustained by the County of Allegheny during the tenure of Cyril H. Wecht, as Coroner of Allegheny County from January, 1970 through December 31, 1978, as the result of the use of County employees, Morgue facilities, supplies and materials for the rendition of services to out-of-county coroners and hospitals which services were not part of the official duties of the Coroner, nor allowed by the Second Class County Code, is $143,615).

26. That Cyril H. Wecht, M. D., Coroner of Allegheny County, executed all official records relative to out-of-county autopsies as Coroner of Allegheny County.

27. That out-of-county hospitals were billed by the Coroner's Office of Allegheny County and were directed to make payments to Cyril H. Wecht, Coroner of Allegheny County.

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28. That Cyril H. Wecht, M. D. as Coroner of Allegheny County, allowed and directed that processing, testing and examination of toxicology specimens submitted by hospitals located within the territorial limits of Allegheny County, Pennsylvania, be performed at the Allegheny County Coroner's Toxicology Laboratory.

29. That Cyril H. Wecht, M. D. as Coroner of Allegheny County, allowed and directed that the Coroner's Toxicology Laboratory process, test and examine toxicology specimens from hospitals located within the territorial limits of Allegheny County, Pennsylvania, using employees, of the County as well as Morgue equipment, supplies, and materials provided by the County of Allegheny to the Morgue.

30. Defendant Wecht as Coroner of Allegheny County, received fees and monies for services provided to hospitals located within the territorial limits of Allegheny County, in connection with the performance of toxicology specimen testing and examination.

31. Defendant Wecht as Coroner of Allegheny County deposited into the transcript fee account of the Coroner of Allegheny County, all of those fees and monies received from hospitals located within the territorial limits of Allegheny County, for toxicology specimen processing, testing, and examination, which activities were performed at the Allegheny County Coroner's Toxicology Laboratory.

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[21] 32. Affirmed as modified. That there is no material difference in the nature or type of toxicology services rendered at the Allegheny County Coroner's Office by employees using equipment and facilities of the County of Allegheny between those toxicology specimens submitted by hospitals located within the territorial limits of Allegheny County or those submitted by coroners of other counties or hospitals or entities located outside the territorial limits of Allegheny County.

33. That the billing procedure for out-of-county and in-county hospitals for toxicology testing services performed at the Morgue was identical in that payment was directed to be made to Cyril H. Wecht, Coroner.

34. That Defendant, is a licensed professional forensic pathologist trained in the art of medicine and science of forensic pathology.

35. Affirmed as modified. That Defendant Wecht rendered opinions both as Coroner of Allegheny County and as a private forensic pathologist in cases investigated, reported and processed at the County Coroner's Office (as part of the Coroner's jurisdiction).

36. Refused. (That opinions and services rendered by Dr. Wecht, as a private forensic pathologist were in part attributable to information obtained as a result of the performance of his duties as Coroner, and use of Morgue facilities, supplies, materials, and employees of the County, in connection with the exercise of the official discretion of the Office of the Coroner.)

37. That Defendant Wecht received fees and monies for professional services and opinions rendered in court hearings, depositions and/or legal/medical consultations

provided in cases which were investigated, reported, and processed at the Allegheny County Coroner's Office as part of the Coroner's jurisdiction totalling $16,100.

38. That the $16,100 was deposited into Dr. Wecht's, Attorney-at-Law Account, #2-116648, maintained by Defendant Wecht at Pittsburgh National Bank.

39. That Defendant Wecht received fees and monies for professional services and opinions rendered in court hearings, depositions as well as for medical/legal opinions and consultations involving cases investigated, reported and processed at the Coroner's Office which were referred from out-of-county coroners which fees amounted to $2,600.00.

40. That the $2,600.00 was deposited into Defendant Wecht's Pittsburgh National Bank account #2-116648.

41. Affirmed as modified. (That the actual loss to Allegheny County as a result of Defendant's professional services rendered in cases investigated, [22] reported, and processed at the Allegheny County Coroner's Office is $18,700.00). Dr. Wecht did not include in his reports required by the Second Class County Code [16 P. S. 4802], any of the monies set forth in the above Paragraphs 37, 38, 39, and 40 totaling $18,700.00.

42. That on or about June 16, 1979 Defendant Wecht produced in response to a Controller's subpoena, 65 case files regarding private autopsies performed by Dr. Wecht at the morgue from 1970 through 1978.

43. Refused. (That private autopsies and histology/toxicology testing, examination and processing related thereto, were performed at the Allegheny County

Coroner's Office at the direction of Dr. Wecht, for reasons unrelated to the discharge or mandate of the official duties of the Coroner.)

44. That private autopsies and histology/toxicology testing, examination and processing were performed at the Allegheny County Coroner's Office, by County employees using morgue equipment, supplies, and materials provided to the morgue by the County of Allegheny.

45. Defendant Wecht received fees as a result of the performance of private autopsies and private histology/toxicology testing, examination and processing in connection therewith which he allowed and directed to be performed at the morgue, using equipment, and materials, and personnel supplied by the County of Allegheny.

46. Refused. (The performance of professional services in connection with the private autopsies and private histology/toxicology testing, examination, and processing at the morgue inured to the benefit and advantage of Defendant Wecht.)

47. That the net receipts collected by Defendant Wecht but not received by the County, for use of its employees, facilities, equipment and supplies in connection with the private autopsies and related services is $58,225.00.

48. Refused. (The actual financial loss sustained by the County of Allegheny as a result of the use of its employees, facilities, materials and equipment for the performance of private autopsies and related services by Defendant Wecht at the morgue is $58,225.00.)

49. That Defendant Wecht received $55,050.00 for the 65 admitted private autopsies performed at the morgue and $3,175.00 for an additional seven admitted autopsies totalling $58,225.00.

50. That Defendant Wecht received fees of $20,000.00 for performance of the 65 admitted private autopsies and $1,850.00 for the additional seven private autopsies for a total of $21,950.00 for the actual performance of 72 private autopsies.

[23] 51. That Defendant Wecht received fees for depositions, court appearances, medical/legal reports and consultations related to the 65 private autopsies in the amount of $34,950.00 and $1,325.00 for the additional seven private autopsies for a total of $36,275.00.

52. That Pittsburgh Pathology and Toxicology Laboratory, Inc. (PP&T), 3600 Forbes Avenue, Pittsburgh, PA is a private business corporation existing under the laws of the Commonwealth of Pennsylvania and was owned by Defendant Wecht for 1970 through September 1978.

53. That one of the business purposes of Pittsburgh Pathology and Toxicology Laboratory was the processing, testing, and examination of clinical specimens for physicians and hospitals.

54. That histology specimens accepted by Pittsburgh Pathology and Toxicology Laboratory were delivered to the Allegheny County Morgue for testing from 1970 through 1978.

55. That the histology specimens from Pittsburgh Pathology and Toxicology Laboratory which were delivered to the Allegheny County Morgue for processing and testing, were identified by Pittsburgh Pathology and Toxicology documentation.

56. That histology specimens delivered to the Allegheny County Coroner's Office from Pittsburgh Pathology and Toxicology Laboratory for processing were delivered during the regular work hours of the Coroner's Office.

57. That Defendant Wecht allowed and directed County employees to process, test, and examine at the Morgue histology specimens delivered from Pittsburgh Pathology and Toxicology Laboratory.

58. That Pittsburgh Pathology and Toxicology Laboratory, received fees as a result of the histology services rendered and performed at the Allegheny County Coroner's Office, using employees, equipment, materials, and supplies of the County of Allegheny.

59. That Pittsburgh Pathology and Toxicology Laboratory benefitted and gained a financial advantage by having histology specimens processed at the Allegheny County Coroner's Office by County employees using Morgue equipment, materials, and supplies purchased by the County of Allegheny.

60. That Defendant Wecht failed to pay Allegheny County for the histology services performed by County employees using Morgue equipment, materials, and supplies of the County of Allegheny County, which services were rendered on behalf of Pittsburgh Pathology and Toxicology Laboratory.

[24] 61. That Pittsburgh Pathology and Toxicology Laboratory received fees for histology testing performed on behalf of Pittsburgh Pathology and Toxicology Laboratory at the Allegheny County Coroner's Office during the years of 1970 through 1978, in the amount of $113,374.25.

62. Affirmed as modified. That the net receipts collected by Pittsburgh Pathology and Toxicology Laboratory, but not received by the County of Allegheny for services as set forth in Paragraph 61 above (use of its employees, facilities, equipment, and supplies in rendering histology services for Pittsburgh Pathology and Toxicology) from 1970 through 1978 is $113,374.25.

63. Refused. (That the actual financial loss sustained by the County of Allegheny as a result of the use of its employees, facilities, materials, and equipment for the rendition of histology services for Pittsburgh Pathology and Toxicology Laboratory is $113,374.25.)

64. Defendant Wecht received fees and revenues from out-of-county coroners for autopsies and histology/toxicology testing performed at the Allegheny County Coroner's Office as well as for related services pertaining to those autopsies covering the period of February 5, 1979 through July 26, 1979, in the amount of $11,260.00.

65. That Defendant Wecht received fees and revenues from out-of-county hospitals and toxicology testing performed at the Allegheny County Coroner's Office, covering the period of February 5, 1979 through July 26, 1979, in the amount of $3,150.00.

66. That the amounts received from out-of-county coroners and out-of-county hospitals, covering the period of February 5, 1979 through July 26, 1979 were deposited to the Mellon Bank Account, "Professional Education Fund," #016-3483 maintained by Defendant Wecht.

67. That the net fees collected by Defendant Wecht but not received by the County for services rendered to out-of-county coroners and hospitals, from February 5, 1979 through July 26, 1979, amount to $14,410.

68. That Defendant Wecht was credited with the closing balance paid by him to the County of Allegheny in the amount of $1,155.19.

69. Affirmed as modified. That the actual financial loss sustained by the County as a result of the services provided to out-of-county coroners and hospitals from February 5, 1979 to July 26, 1979 is $13,254.81.

[25] 70. Refused. (Defendant intentionally practiced deception by his refusal from 1970 to the present date to make full and complete disclosure to the Controller of all fees received by him in the office of coroner for performance of autopsies for out-of-county coroners, histology/toxicology testing, and private autopsies performed at the county morgue as well as consulting services, depositions, court appearances and medical-legal reporting related to autopsies performed.)

71. That during county salary board meetings from 1970 through 1979 and while seated as a member pursuant to the Second Class County Code, 16 P.S. §4825, whenever the board considered matters affecting

the office of coroner, Defendant failed to disclose that he maintained private bank accounts in which he deposited fees received which were neither reported nor turned over to the county treasury.

72. Affirmed as modified. That defendant (intentionally) withheld information from the salary board during meetings, which defendant was seated, regarding private salary arrangements made by Defendant with his chief pathologist Dr. Joshua Perper, or the additional compensation arrangements with other employees of the morgue who performed work related to the out-of-county autopsies, private autopsies, and histology/toxicology testing.

73. Defendant failed to obtain authorization or approval by the county board of commissioners for use of the county morgue, its facilities, equipment and supplies and county employees in the performance of autopsies for out-of-county coroners, private autopsies, and histology/toxicology testing services for which fees were charged but neither reported nor turned over to the county.

74. That defendant failed to report to the Controller as required by the Second Class County Code, 16 P.S. §4802, any of the fees received by him from 1970 through 1978 in performance of the services which form the basis of the Controller's surcharge.

75. That defendant failed to report to the Controller as required by the Second Class County Code, 16 P.S. §4802, any of the fees received by him in 1979 in performance of the services which form the basis of the Controller's surcharge.

76. Affirmed as modified. Defendant (intentionally) withheld payment to the Allegheny County treasury of all fees generated by him in performing autopsies for out-of-county coroners, histology/toxicology testing, and private autopsies at the morgue as well as consulting and other services related to performance of the autopsies.

77. Affirmed as modified. Defendant did not (deliberately failed to) secure a legal opinion or otherwise obtain ruling by the Controller regarding defendant's decision to charge and retain fees for the subject autopsy and histology/toxicology testing services performed at the county morgue.

[26] 78. That defendant established private bank accounts at Mellon Bank during his term of office as coroner from which he made disbursements of funds belonging to Allegheny County without the knowledge, authorization or approval of the county commissioners.

79. Affirmed as modified. Defendant gave (arrogated) to himself the sole discretion to disburse the funds received by him which belonged to Allegheny County for whatever purposes he deemed fit and without consent or authorization of the county commissioners.

80. Affirmed as modified. That in reply to the Controller's September 24, 1976, request for disclosure of all accounts, escrowed or otherwise, independently maintained by row officers, defendant did not report (concealed) the existence of the private bank accounts maintained by him in which fees were deposited which belonged to Allegheny County.

81. Affirmed as modified. Defendant did not record any of the private autopsies performed at the county morgue in the coroner's office body log. (although county employees performed the private autopsy services on county time using morgue equipment, facilities and supplies.)

82. Affirmed as modified. That the annual reports required of biochemical laboratories were submitted by defendant to the Commonwealth of Pennsylvania with the knowledge that the Morgue was not listed as a reference lab. (reports were not accurate with respect to where histology testing was performed for defendant's private laboratory.)

83. That defendant billed out-of-county coroners and hospitals on stationery of the office of coroner, directed that payment be made to the coroner of Allegheny County, and deposited to defendant's Mellon Bank accounts all checks made payable to the coroner of Allegheny County in rendition of services which formed the basis of the Controller's surcharges.

84. Refused. (That in January 1976 defendant falsely represented to a representative of the Pennsylvania Bureau of Health Insurance that surgical tissue work was performed at defendant's private laboratory when in fact the tissue work was being done at the morgue.)

85. Affirmed as modified. That in 1975 defendant made application through the Center for Disease Control for an interstate license to conduct tissue work for (at) the Morgantown Laboratory, and as a result, an inspection was made of PP&T by Center for Disease Control inspectors.

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86. Affirmed as modified. That prior to (on or about) the day of inspection of PP&T, a (an Allegheny County) tissue processor was brought (transferred) to the private laboratory by defendant.

[27] 87. Affirmed as modified. That defendant brought (appropriated to his own use) a tissue processor (owned by the County of Allegheny by transferring the equipment) to his private laboratory at PP&T prior to inspection by the Center for Disease control to (falsely) prove that the private laboratory met all qualifications for licensure.

88. Refused. (Defendant's transfer of county morgue equipment to his private laboratory was calculated to deceive the Center for Disease Control which was not advised by defendant that the equipment belonged to Allegheny County.)

89. Refused. (That defendant's acts in concealing information about his revenue producing activities at the morgue amounts to fraud.)

90. Affirmed as modified. That defendant's actions in appropriating all fees generated by him in the office of coroner which were not reported to the Controller can be taken as evidence of (amounts to) fraud.

91. Affirmed as modified. Defendant was required by law to make full disclosure to the Controller of all fees earned and received by him in the office of the coroner. (and intentionally failing to do so, defendant was guilty of fraud.)

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92. Refused. (Defendant knowingly concealed facts from state and federal authorities regarding tissue work performed at the morgue for defendant's private laboratory which further establishes defendant's fraudulent intent to use the county morgue for his pecuniary and private interest.)

[28] *FINDINGS OF COURT IN ADDITION TO CONTROLLER'S FINDINGS AS TO FRAUD*

FINDINGS OF FACT

1. Through a copy of a letter from the Laboratory Examiner Section of the Department of Health, Commonwealth of Pennsylvania, dated January 16, 1976, Dr. Wecht was informed that the practice of screening Pap smears in a home as well as the processing of tissues at the County Coroner's Laboratory is contrary to the Regulations of the Department of Health of the State of Pennsylvania. As such, it was noted as a deficiency.

2. Dr. Wecht responded to the Bureau of Laboratories by letter of February 11, 1976, stating that the Pap smears henceforth would be done in one of the laboratory facilities of Pittsburgh Pathology and Toxicology Laboratory, and that "The processing of surgical tissues will be performed at 3600 Forbes Avenue. Equipment has been obtained for this purpose." The address listed was that of Pittsburgh Pathology and Toxicology Laboratory. At that time Pittsburgh Pathology and Toxicology Laboratory did not have the necessary equipment to process surgical tissue, contrary to the statement of Dr. Wecht in his letter, that "That equipment has been obtained for this purpose."

3. By examination of reports and enclosure letters to coroners out-of-county, the official County of Allegheny stationery showing Cyril H. Wecht as Coroner was used. The autopsy report was signed by Cyril H. Wecht as Coroner of Allegheny County. The enclosure letter contained statements such as, "Thank you for [29] consulting our office in this matter." Checks were made by the counties to which billing was sent by the defendant to County of Allegheny, Cyril H. Wecht, Coroner, but in several instances from the Exhibits, it is determined the checks were made by the respective out-of-county officials to the County of Allegheny, and despite this were endorsed and deposited by Dr. Cyril H. Wecht, M.D. in his Mellon Bank account #400-8405.

4. Billing by Dr. Wecht to the out-of-county hospitals was done on official stationery with directions to make the check payable to Cyril H. Wecht, M. D., Coroner. Such checks were then deposited by Dr. Wecht in his Mellon Bank Account #400-8405 without any accounting to the County of Allegheny.

5. That on September 24, 1976, a letter was addressed by the then Controller, John P. Lynch, to all county row officers, as well as the County Commissioners and directors stating it had come to his attention that funds received or escrowed by certain county officials from grants or other sources had been independently deposited by offices. He cautioned that the practice should no longer be followed. He then requested a complete listing of all depository or escrow accounts presently under the supervision of the County official in accordance with Article XIX, Paragraph 4901

of the Allegheny County Second Class Code. The information was to be forwarded to his Office no later than October 24, 1976. When this letter was received, it was directed by Dr. Wecht to his then Solicitor, Stanley M. Stein, Esquire, for answering. Thirteen days later on October 7, 1976, a response letter was left with Dr. Wecht by his Solicitor without the letter of inquiry of September 24, 1976. The responding letter failed to disclose any of the Mellon National Bank accounts in which [30] the so-called Professional Education funds were deposited. Dr. Wecht relied upon the advice of his Solicitor in the preparation of the letter. The section of the Second Class County Code referred to in both the letter of Controller Lynch and Dr. Wecht requires that all county officers report all public monies which they collect, receive or distribute or which are charged to the management or custody of that public officer. [16 P. S. 4901].

6. The practice followed by Dr. Wecht concerning the Professional Education Fund was initiated by Dr. Hunt and carried on by Dr. Hunt's successor, Dr. Stalter, the predecessor of Dr. Wecht.

7. Although it would have been the better practice for Dr. Wecht to have informed the Salary Board that he was supplementing the salary of Dr. Joshua Perper, the Chief Forensic Pathologist, and the salary of the residents or Fellows in training, we do not conclude that this was done for the purpose of intentionally withholding information to defraud the County in that there was no loss sustained by the County.

8. Dr. Wecht did pay from his personal funds monies to County employees who worked on their own time in the assistance of private autopsy services, and he did replace the expendable Morgue equipment or materials required in such autopsies.

9. Although Dr. Wecht did not report the Morgue as a reference lab in the reports required to be submitted to the Commonwealth of Pennsylvania annually, Dr. Wecht did not regard the Morgue in the category of a reference lab that required reporting.

10. Prior to an inspection by the Center for Disease Control for [31] permission to transport tissue for processing interstate, Dr. Wecht did bring a tissue processor to the laboratory at Pittsburgh Pathology and Toxicology Laboratory at 3600 Forbes Avenue which remained for an undetermined period thereafter up to several months. There was no clear and precise evidence that the tissue processor did in fact come from the Morgue of Allegheny County.

[32] *PROPOSED FINDINGS OF FACT AS SUBMITTED BY DEFENDANT*

1. Before 1966, the Allegheny County Coroner's Office was an archaic and primitive operation without proper facilities to perform autopsies; with one histologist who had little or no equipment, and with no facilities for toxicology, x-ray, photography or other equipment and personnel necessary to function as a medical examiner-type office.

2. The Coroner in office before 1966 had no medical training or professional expertise, his predecessor was a dentist.

Appendix D—Adjudication of the Court of Common Pleas of Allegheny County, Pennsylvania.

3. Before 1966, the Coroner of Allegheny County retained independent medical doctors on a case by case basis to perform a limited number of autopsies estimated at approximately 100 per year.

4. The Coroner paid these medical doctors a fee for any autopsies performed.

5. The District Attorney of Allegheny County paid these medical doctors a fee for any appearance in Court in any criminal action related to the autopsies performed by them.

6. During the years preceding 1966, William R. Hunt, M. D. and Cyril H. Wecht, M. D. were working, along with other members of the Allegheny County Medical Society, to establish a modern medical examiners facility at the morgue of Allegheny County.

7. Although William R. Hunt, M. D. ran for Coroner of Allegheny County as a Republican, he was supported in his efforts during 1965 by Cyril H. Wecht, M. D., a Democrat.

8. William R. Hunt, M.D. was elected Coroner of Allegheny County during November of 1965 and assumed that office during January of 1966.

9. At that time, Cyril H. Wecht, M.D. was a medical doctor as well as a lawyer licensed in both professions in the Commonwealth of Pennsylvania and was board certified in anatomic, clinical and forensic pathology. He had achieved many other outstanding professional attainments, including law and medical school faculty appointments, honorary society memberships and had published extensively in the fields of pathology, legal medicine and forensic sciences.

10. Dr. Hunt hired Dr. Wecht to become Chief Forensic Pathologist of the Allegheny County Coroner's Office shortly after Dr. Hunt assumed office as Coroner but since the Salary Board title of Forensic Pathologist had not yet been established, Dr. Wecht was slotted in a different payroll slot until the payroll title of Forensic Pathologist was established by the Salary Board of Allegheny County.

[33] 11. Charles L. Winek, Ph.D., a faculty member at Duquesne University, was and is a toxicologist with outstanding credentials.

12. During 1966, Dr. Hunt retained Dr. Winek as Chief Toxicologist of the Allegheny County Coroner's Office although he functioned under a different payroll title until that of Chief Toxicologist was established by the Salary Board of Allegheny County.

13. Drs. Hunt, Wecht and Winek immediately set about to modernize the Coroner's Office and began to hire professional and paraprofessional employees as well as acquire equipment.

14. During 1966, Dr. Hunt decided that the Coroner's Office would begin to perform autopsies and histology studies for coroners outside of Allegheny County and toxicology for hospitals located outside of Allegheny County.

15. Affirmed as modified. Drs. Hunt, Wecht and Winek decided that the funds received for out-of-county professional services would be deposited into a checking account at Mellon Bank to be used for professional and educational purposes.

16. During March of 1967, Dr. Hunt opened the checking account, signed the signature card and indicated on the signature card that the business of the person opening the account was Coroner-(Education Fund).

17. Dr. Hunt directed that payments by Coroners and hospitals outside of Allegheny County for autopsies, histology, and toxicology were to be deposited in the Mellon Bank account which he had established.

18. These funds were deposited in this account while Dr. Hunt was Coroner until January of 1968.

19. Dr. Hunt was elected a Commissioner of Allegheny County during November of 1967 and assumed that office during January of 1968.

20. During January of 1968, Ralph J. Stalter, M. D. became Coroner of Allegheny County.

21. During January or February of 1968, Dr. Stalter deposited in a checking account at Mellon Bank the balance received from Dr. Hunt from the account maintained by him as the Professional Education Fund.

22. Dr. Stalter was Coroner of Allegheny County until January of 1970.

23. Dr. Stalter continued the practice established by Dr. Hunt of depositing into the Mellon account, which he had established as the Professional Educatior. Fund, all proceeds received from out of County coroners and hospitals.

[34] 24. During the time he was Coroner, Dr. Hunt disbursed from the Professional Education Fund money to defray the expenses of attendance at professional seminars, conventions and other educational meetings of various professionals employed at the Allegheny County Coroner's Office as well as reprints of professional articles and the purchase of professional publications. He also disbursed funds for a professional luncheon and for expenses incurred by him while attending a meeting of the American Medical Association in San Francisco.

25. During Dr. Hunt's tenure as Coroner of Allegheny County, Dr. Wecht received one check which reimbursed him for part of the expenses incurred by him while attending a professional convention. While Dr. Hunt was Coroner, he was the only authorized signature on the Mellon Bank Account for the Professional Education Fund.

26. While Dr. Stalter was Coroner, he was the only authorized signature on the Mellon Bank account for the Professional Education Fund.

27. During the approximately two years that Dr. Stalter was Coroner of Allegheny County, he disbursed funds from the Mellon Bank account, which he had established as the Professional Education Fund, for attendance at professional seminars, conventions and other educational meetings and professional association memberships for the professional personnel of the Coroner's Office as well as for staff luncheons and the purchase of professional publications.

28. Dr. Hunt remained a Commissioner of Allegheny County until January of 1976 and again became a Commissioner of Allegheny County in January of 1980 and continues as such until the present time.

29. Affirmed as modified. During the years of 1968 through 1970 (all of the time that he was a Commissioner of Allegheny County) Dr. Hunt knew that the Coroner of Allegheny County maintained a Professional Education Fund into which he deposited proceeds from out-of-county coroners and hospitals and from which he disbursed funds for professional education and training as well as to supplement professional and paraprofessional salaries, to purchase equipment and supplies, and to pay memberships to professional organizations and to purchase professional publications.

30. While a Commissioner of Allegheny County, Dr. Hunt, on January 14, 1969, wrote a memorandum to Dr. Stalter re: Purchase Order for #4748 Reprints, Marcel Dekker, Inc. as follows: "I am referring this to the Law Department because I have been informed that the County cannot pay for reprints of articles written by County employees."

"Don't you have a book or educational account over there that this should come out of?"

[35] 31. Cyril H. Wecht, M. D. was elected Coroner of Allegheny County during November of 1969 and assumed that office during January of 1970.

32. Dr. Wecht served as Coroner of Allegheny County continuously from January of 1970 until January of 1980 when he assumed the office of Commissioner of Allegheny County.

33. Dr. Wecht continues as Commissioner of Allegheny County until the present time.

34. Affirmed as modified. During Dr. Wecht's tenure as Coroner of Allegheny County, he was one of the principal forces in the transformation of the office into a first-class modern medical examiners facility.

35. By 1979, the Allegheny County Coroner's Office was recognized as one of the finest medical examiner type offices in the United States.

36. By 1979, Dr. Wecht was acknowledged as one of the foremost forensic pathologists in America.

37. During the 1970's, Dr. Wecht transformed the office of the Coroner of Allegheny County into a de facto modern medical examiners office.

38. On December 31, 1969, Ralph J. Stalter, M. D. issued from the Professional Education Fund Mellon checking account a check in the amount of $1,045.00 payable to C. H. Wecht, M. D., LL.B which was the balance of the account maintained by him as the Professional Education Fund and which disbursement closed that account.

39. Dr. Wecht's employees at the Coroner's Office deposited the check from Dr. Stalter into a new checking account at Mellon Bank which constituted the first bank account forming the Professional Education Fund while Dr. Wecht was Coroner. The two authorized signatures on the account established for Dr. Wecht were Dr. Wecht and June S. Schulberg, Esquire, Chief Deputy Coroner.

40. Affirmed as modified. Many (Most) of the checks drawn between 1970 and 1973 were signed by Ms. Schulberg. Thereafter, most of the checks drawn on this account were signed by Dr. Wecht until the account was closed and a new checking account opened during 1974 as the account for the Professional Education Fund and on which Dr. Wecht was the sole authorized signature.

41. Affirmed as modified. During his administration as Coroner, the performance of autopsies and histology for out-of-county coroners and toxicology for out-of-county hospitals greatly expanded in part because of the expertise and reputation of Dr. Wecht relative to the autopsies and histology and Dr. Winek relative to the toxicology.

42. All of the funds received for these activities during the 1970's were deposited into the Professional Education Fund bank account.

[36] 43. Affirmed as modified. During the 1970's, checks were drawn on the account constituting the Professional Education Fund to supplement the salary of Joshua Perper, M.D., who had become Chief Forensic Pathologist of the Allegheny County Coroner's Office in 1972; to pay more than one-half of the salaries of the residents or fellows in the residency program after expiration of the LEAA Grant; to pay paraprofessional employees of the Coroner's Office for performance of autopsies, technology, photography, histology and medical secretarial services in connection with performance of out-of-county autopsies; for expenses incurred by professionals of the Office in attendance at seminars, professional meetings and other training

activities; membership dues in professional associations; purchase of equipment and supplies for the Coroner's Office; purchase of professional publications and books; staff and other professional luncheons and dinners, personal-political contributions, parties and material relative to J.F.K. assassination. (and an insignificant amount for other miscellaneous activities.)

44. Affirmed as modified. Memberships in professional organizations could only be held by qualified pathologists and toxicologists and could not be held by the Allegheny County Coroner's office alone. Materials obtained from these memberships assisted (were essential to) the Coroner's office and remained in the Coroner's office. (Books, slide study sets and other educational materials derived from these memberships are still being used and are part of ACCO medical-legal library and teaching material.)

45. Dr. Wecht and his staff were not required to perform autopsies, histology, or toxicology for out-of-county coroners or hospitals as part of the duties of the Coroner of Allegheny County.

46. Dr. Wecht and the other pathologists who performed autopsies for out-of-county coroners and Dr. Winek and his assistants who performed toxicology for out-of-county hospitals received no personal payments for these services.

47. Affirmed as modified. Dr. Wecht was retained by the Westmoreland County Coroner, Leo Bacha (coroners from other counties) because of his expertise as a forensic pathologist.

48. Refused. (Dr. Wecht was retained by coroners from other counties to perform autopsies as a private forensic pathologist and not as Coroner of Allegheny County.)

49. Affirmed as modified. Dr. Wecht could have with the consent of the County Commissioners or if not done at the Allegheny County Morgue received and retained the payments for the autopsies by the coroners of other counties as his personal professional earnings.

50. Refused. (During the 1970's Dr. Wecht and the other professionals employed at the Allegheny County Coroner's Office conferred a significant benefit upon that office and in turn the County of Allegheny by depositing the funds into the Professional Education Fund account.)

[37] 51. Refused. (No proof was submitted or offered by Plaintiff that there were any extra expenses incurred by ACCO for the performance of toxicology analysis for out-of-county hospitals because no such expenses were incurred.)

52. Refused. (Witnesses who were called by Dr. Wecht to testify indicated that they had been contacted by the Controller's Office and they had indicated to the Controller, prior to their testimony, that these tests could not be performed by any Allegheny County department or laboratory.)

53. Refused. (Defendant made every effort to present as much information as possible to the Court and called these laboratory experts as witnesses to prove that these tests could not be performed by these county agencies.)

54. Plaintiff called no medical witnesses except Cyril H. Wecht as to the value of autopsies.

55. While Dr. Wecht was Coroner of Allegheny County, he was not required to work as Coroner on any specific time schedule.

56. Affirmed as modified. While Coroner, Dr. Wecht could lawfully maintain (was not restrained in any way from maintaining) private professional activities including those from which he earned private fees.

57. Affirmed as modified. The Professional Education Fund assisted in some degree (resulted) in the enhancement of the education and professionalism of the professionals and paraprofessionals employed by the Allegheny County Coroner's Office, including Dr. Wecht.

58. Affirmed as modified. The disbursements from the Professional Education Fund helped establish to some degree the Allegheny County Coroner's Office as a modern medical examiners office.

59. Refused. (The deposits of the funds into the Professional Education Fund and disbursements therefrom for the purposes described above caused no loss to Allegheny County or its taxpayers.)

60. Affirmed as modified. Dr. Wecht's activities in the performance of some autopsies for out-of-county coroners and in testifying in the related criminal cases was (widely) publicized in the news media in Pittsbugh throughout the 1970's.

61. Refused. (The Commissioners of Allegheny County during the 1970's knew or should have known

that the Allegheny County Coroner's Office was performing services for out-of-county coroners and hospitals.)

62. Until July of 1979, the Commissioners of Allegheny County did nothing to prohibit in any way the performance of services for out-of-county coroners and hospitals.

[38] 63. Affirmed as modified. On July 19, 1979, by Resolution consented to by Dr. Wecht as Coroner, it was resolved by the Commissioners of Allegheny County that the funds received for services rendered to out-of-county Coroners and hospitals would be deposited into the Treasury of Allegheny County into an account designated for the same purposes for which the Professional Education Fund had been used by Dr. Wecht and his two predecessors since 1967, but disbursement of monies and fees charged were subject to approval of the County Commissioners.

64. Refused. (The deposits into and disbursements from the Professional Education Fund account decreased significantly the amount necessary to be appropriated by the Commissioners of Allegheny County in the budget of the Coroner of Allegheny County for the purposes for which the funds were disbursed.)

65. Approximately 5,000 deaths are reported to the Allegheny County Coroner's Office each year.

66. The Coroner's Office assumes jurisdiction in approximately 2,500 deaths per year. During the 1970's, approximately 1,800 bodies per year were examined in the autopsy room of the Allegheny County Coroner's Office.

67. Affirmed as modified. Of this amount, approximately 900 received external examination while another 900 received internal (complete) autopsies.

68. During the 1970's on the average, the Allegheny County Coroner's Office performed less than one out-of-county autopsy per week.

69. Affirmed as modified. Some of the out-of-county autopsies were unusual cases and were of educational value to the pathologists, resident pathologists and paraprofessionals of the Coroner's Office.

70. During the 1970's the Allegheny County Coroner's Office was operated at a lower payroll than the medical examiner's office of Philadelphia based upon the respective population of the two counties.

71. The Professional Education Fund filed IRS returns for the years 1974 through 1979 which were cleared by the IRS.

72. Affirmed as modified. Tax in the amount of $464 plus interest of $2,161.00 for a total of $2,625.00 was owed and was paid covering the five year period.

73. Affirmed as modified. Cyril H. Wecht, M. D. received no personal income from any Professional Education Fund, but did receive great personal benefit from its use such as frequent trips overseas and throughout the United States.

[39] 74. During the ten years Dr. Wecht was Coroner of Allegheny County, 26 checks from the Professional Education Fund were made payable to him. Of these, 24 were for reimbursement of expenses incurred in

attendance at professional seminars or other professional meetings or activities and two were for reimbursement of expenses for business meals.

75. During the 1970's, funds earned by the professionals at the Allegheny County Coroner's Office from activities other than outside autopsies and toxicology were deposited to the Professional Education Fund.

76. These other activities included but were not limited to lectures at Duquesne University, lectures at the Allegheny County Police Academy funded by the Pennsylvania Governor's Justice Commission and honorariums received for other guest lectures.

77. Refused. (Toxicology services rendered for a fee for in-Allegheny County hospitals produced approximately $500,000.00 income to the County of Allegheny during the ten year period Dr. Wecht was Coroner, prior to Dr. Hunt's administration no fees were generated for Allegheny County for any services by ACCO.)

78. In 1972, the three Commissioners of Allegheny County signed application for L.E.A.A. Grants to fund a residency program at the Allegheny County Coroner's Office which began that year. These applications included the representation that surgical specimens would be provided for examination by the resident pathologists from an outside source.

79. The Central Medical Pavillion Hospital began to operate during August of 1974 and has operated as a 240 bed general hospital. It is now known as Central Medical Center and Hospital.

80. Central Medical Hospital has recently become a non-profit corporation but was established by Dr. Wecht and others as a privately-owned hospital during 1974.

81. After Dr. Wecht's resignation from St. Clair Hospital he had not been affiliated with any other hospitals until the opening of Central Medical Hospital in August of 1974.

82. Since shortly after its opening, Dr. Wecht has been on the Board of Directors and Medical Staff Executive Committee and has served as Chief of Pathology and Director of the hospital's laboratory facilities including the autopsy and histology section.

83. Since August of 1974, Dr. Wecht has been permitted to use the autopsy and histology facilities of Central Medical Pavillion Hospital for his private pathology and autopsy activities without charge.

[40] 84. During that period, Dr. Wecht had used the facility for such private activities without charge by the hospital.

85. Since February 1979, Dr. Wecht has processed his tissue specimens at Central Medical Pavillion Hospital without charge.

86. Affirmed as modified. Since 1979, Dr. Wecht openly solicited out-of-county coroners and has conducted autopsies for out-of-county coroners, including the Coroner of Westmoreland County who previously furnished approximately 70% of the out-of-county autopsies, and other private autopsies at Central Medical Pavillion without charge to him by the hospital.

87. Cyril H. Wecht, M. D. established the laboratory known as Pittsburgh Pathology and Toxicology Laboratories, Inc. (hereafter PP&T) during 1964 and owned and operated same until he sold the corporation during September of 1978, the closing effective November 1, 1978.

88. PP&T was initially operated at 220 Meyran Avenue, and later at 3600 Forbes Avenue, both in the Oakland section of Pittsburgh, with branches later established at the Highland Building in the East Liberty section of Pittsburgh and in Monroeville, a suburb of Pittsburgh.

89. PP&T provided services in anatomic pathology, clinical pathology, forensic pathology, forensic toxicology and immunology.

90. Refused. (A relatively small percentage of the business of PP&T was the processing and diagnosis of surgical specimens known as histo-pathology.)

91. Affirmed as modified. Approximately one-third (A relatively small proportion) of the histo-pathology surgical specimens were prepared for microscopic examination of slides containing tissue from the specimens.

92. The preparation of such tissue slides is commonly known as histology.

93. Until the summer of 1968 all of the histology performed on the surgical specimens of PP&T including the microscopic slides was performed at 3600 Forbes Street by a medical technologist employee of PP&T.

94. During the summer of 1968, the medical technologist doing this histology work left the employ of PP&T.

95. Dr. Wecht could have had this histology work continued by other medical technology employees at PP&T with the investment of $50.00 to purchase the microtome owned by the departing technologist.

96. Dr. Wecht decided at that time to have most of the histology work involving the preparation of slides for PP&T done at the Allegheny County Coroner's Office by employee Ruth Laufe, on her own time, and as a favor to Dr. Wecht.

[41] 97. Affirmed as modified. Among his reasons for doing this were that he could avoid a second trip to PP&T during the course of the day which took him away from the Coroner's Office for a longer period than he desired to be away, and to have surgical specimens available to be studied by himself, his fellow staff pathologists and the resident pathologists he hoped to have in his residency program shortly.

98. Refused. (At about that same time, Dr. Wecht resigned a $30,000.00 per year part-time staff pathologist appointment at St. Clair Memorial Hospital located in Mt. Lebanon Township, a suburb of Pittsburgh.)

99. Affirmed as modified. Dr. Wecht resigned his position as part-time staff pathologist at St. Clair Memorial Hospital (from his lucrative position) in order to devote more time to the office of Coroner of Allegheny County.

100. Also employed by PP&T were Dr. Perper, who succeeded Dr. Wecht as Chief Forensic Pathologist and the other staff pathologists of the Allegheny County Coroner's Office including Drs. Reidbord, Gloodblatt, Jupin and Larkin.

101. During the period 1970 until 1978, Dr. Wecht had certain of his PP&T surgical specimens delivered to the Allegheny County Coroner's Office for gross or gross and microscopic study by him, the other pathologists, and the resident pathologists starting in 1972.

102. Affirmed as modified. In 1970, the average daily number of surgical specimens delivered to ACCO from PP&T were three per day for each of the 250 work days per year of which one-half were for gross examination and the other one-half for gross examination and microscopic examination. During the years that followed, there were delivered the following: 1971-3.2 being the total of which 1.6 were grossed only; 1972-3.6 being the total of which 1.8 were grossed only; 1973-4 being the total of which 2 were grossed only; 1974-4.3 being the total of which 1.7 (3.9) were grossed only; 1975-8.7 being the total of which 3.9 (3.4) were grossed only; 1976-10.9 being the total of which 5.5 were grossed only; 1977-9.0 being the total of which 5.7 were grossed only; 1978-13.4 being the total of which 9.2 were grossed only.

103. Affirmed as modified. The surgical specimens provided to ACCO by PP&T between 1970 and 1978 were minimally beneficial to the Coroner's Office in that they provided a teaching aid for the residents and were available for the staff pathologists to maintain their histo-pathology skills which enhanced their practice of forensic pathology at ACCO.

104. After establishment of the residency program in 1972, Dr. Wecht paid Martha Bailor and Ruth Laufe from his personal funds for the extra time devoted by them to the histology work on the PP&T tissue and their assistance with the residency program in the study of this tissue.

[42] 105. Affirmed as modified. The availability of the PP&T surgical specimens at ACCO was a minimal benefit to the Coroner's Office and to the County of Allegheny.

106. Dr. Wecht provided or replaced all expendable materials used at ACCO in the histology work performed on the PP&T tissue specimens.

107. Refused. (The processing of the PP&T specimens with the autopsy tissue incurred no additional expense to ACCO; nor did the processing of the PP&T tissue depreciate or cause wear to the histology laboratory equipment.)

108. Affirmed as modified. Dr. Wecht provided the diagnosis to PP&T on all tissue provided to ACCO by PP&T when he was available to do so.

109. Affirmed as modified. Dr. Wecht microscopically examined and provided the diagnosis on all tissue provided to ACCO by PP&T of which slides were created when he was available to do so.

110. Refused. (The examination of the PP&T tissue slides by resident pathologists or staff pathologists at ACCO provided nothing of value to PP&T or Dr. Wecht.)

111. On occasions when Dr. Wecht was absent from Pittsburgh for an extended period, Dr. Perper or one of the other staff pathologists made the diagnosis for PP&T.

112. Affirmed as modified. When this occurred, that diagnosis was given gratis to Dr. Wecht by one of his colleagues. (on their own time or as an employee of PP&T.)

113. The histology performed on the PP&T tissue did not delay or otherwise interfere with the histo-pathology work on autopsy at ACCO.

114. Refused. (The histology work on PP&T specimens at ACCO did not cause ACCO or the County of Allegheny any actual financial loss.)

115. Dr. Wecht could have had histology work on the PP&T surgical specimens performed free at Central Medical Pavillion Hospital from August, 1974 until the present time.

116. Affirmed as modified. Dr. Wecht submitted a "Tissue Request" into evidence showing the name (operated) Cyril H. Wecht and Pathology Associates, 1400 Center Avenue, Pittsburgh, PA (since 1974, including histo-pathology testing and diagnosis of surgical specimens.) He submitted no other evidence concerning trading under such a name.

[43] 117. Since February 1979, Dr. Wecht has had the histology work on his private surgical specimen business performed at Central Medical Pavillion Hospital without charge.

118. Affirmed as modified. The expendable materials consumed in the histology of the PP&T tissue at ACCO from 1970 through 1978 was replaced by the defendant. (negligible).

119. Dr. Wecht conceived the idea of a forensic pathology residency program at ACCO in 1968, the first proposal was submitted to the professional licensing organizations in 1969 and approval was received in January of 1972. The first resident commenced in the program July 1, 1972.

120. Affirmed as modified. Microscopic slides of surgical specimens are considered part of a patient's medical records and will not be released by a hospital without a Subpoena or a signed authorization by the patient. Therefore, they fall within the legal requirement of physician-patient confidentiality. Such information and material cannot be made available or released to any individuals without full knowledge and prior consent of the patient. This is equally applicable to the use of slides from PP&T used by the Forensic Pathologists and Residents. There is no evidence permission was obtained from any patient.

121. Microscopic slides or surgical specimens are considered part of a patient's medical records and are kept indefinitely by the hospital for possible future treatment as indicated in the testimony of Dr. James Rock.

122. Microscopic slides and surgical specimens are considered part of a patient's medical records. Physicians, including other pathologists, who are not

members of that particular hospital staff have no legal right or authority to examine these surgical specimens or microscopic slides received and processed by the Department of Pathology in that hospital in the daily and routine course of business.

123. Affirmed as modified. (Fresh) Surgical specimens (were not available to ACCO from any hospitals in the Pittsburgh area and) were (specifically) required in the residency application grant from LEAA. This grant was approved and officially signed off by the Allegheny County Commissioners in 1971. Therefore, the Commissioners had or should have had knowledge that surgical specimens from outside sources were to be submitted and processed at ACCO as part of the Forensic Pathology Residency Training Program.

124. Plaintiff called no medical witnesses except Cyril H. Wecht as to the value of fresh surgical slides.

125. Surgical slides without the tissue of the specimen are not as valuable an educational aid as with the surgical specimens.

[44] 126. Refused. (In order to examine specimens and slides at CMP, the ACCO pathology residents and the Chief Forensic Pathologist and Dr. Wecht would have been required to become members of the staff of that hospital and to leave ACCO to travel to and from the hospital for such examinations.)

127. Affirmed as modified. During the decades of the 1970's, PP&T performed acid phosphatase testing for ACCO without charge. (such work having a value in excess of $90,000.00) No testimony was offered as to any

effort by Dr. Wecht to coordinate with other County Labs during this period to train or have County lab personnel trained to perform such tests.

128. While Dr. Wecht was Coroner, he performed 120 autopsies which would have cost the County of Allegheny $30,000.00 to have performed by an independent pathologist.

129. Refused. (While Dr. Wecht was Coroner, he performed 60 (600) external body examinations which would have cost the County of Allegheny $9,000.00 to have performed by an independent pathologist.)

130. Refused. (During the time he was Coroner, Dr. Wecht appeared in Court 60 times which would have cost the County of Allegheny $30,000.00 if this had been required of an independent pathologist.

131. Affirmed as modified. While he was Coroner, Dr. Wecht arranged to have 140 neuropathologic examinations for ACCO by the University of Pittsburgh Medical School Neuropathologists without charge. (which would have cost the County of Allegheny $28,000.00 to have performed by an independent pathologist.)

132. Affirmed as modified. During the time he was Coroner, Dr. Wecht arranged to have 120 dental examinations by expert ondontoglists who were friends of Dr. Wecht without charge. (which the County of Allegheny would have paid $12,000.00 to have performed by an independent expert.)

133. Affirmed as modified. During the time he was Coroner, Dr. Wecht arranged for special x-ray examinations by the radiologists at Central Medical

Pavillion Hospital. (which would have cost the County of Allegheny $15,000.00.) During the time he was Coroner, Dr. Wecht arranged for the examination of heart pacemakers by an expert. (who was a friend of Dr. Wecht which had a value of $1,000.00.)

134. Refused. (All of the benefits bestowed upon ACCO by or on behalf of Dr. Wecht without charge were reasonable and necessary services required by ACCO to properly function as a modern medical examiner office.)

[45] 135. Refused. (Dr. Wecht provided a substantial benefit to ACCO and the County of Allegheny by providing these free services or arranging that they be provided to ACCO by others.)

136. Refused. (Plaintiff introduced no credible evidence to dispute the free work performed by ACCO by Central Medical Pavillion and PP&T.)

137. Dr. Wecht was retained by private parties for counsel as a private forensic pathologist to perform autopsies on 72 occasions during the 1970's and to provide a medical report, confer with counsel, testify in depositions, testify in Court and provide related assistance to parties in private civil matters.

138. In these cases, he was not retained as the Coroner of Allegheny County.

139. Typically, he would testify in these cases that he was not acting as Coroner of Allegheny County.

140. The purpose of performing these autopsies was to formulate expert opinions on matters relating to private inquiry or litigation.

141. None of these cases had come under the jurisdiction of the Allegheny County Coroner's Office.

142. Many of these cases were autopsies of decedents who had died outside the limits of Allegheny County.

143. Affirmed as modified. Dr. Wecht's activities in the consultation, evaluation and testifying in the private autopsy cases had nothing to do with his rights or obligations as Coroner of Allegheny County.

144. If Dr. Wecht had performed these autopsies at locations other than ACCO, this would have decreased the time he was able to spend as Coroner at ACCO.

145. Affirmed as modified. Some of Dr. Wecht's private autopsies were (usually) embalmed or exhumantion cases or both or had other unusual characteristics not normally seen in the jurisdiction autopsies at ACCO.

146. Affirmed as modified. The performance of some of the private autopsies at ACCO by Dr. Wecht were a benefit to ACCO since these cases were unusual and of (outstanding) educational value to both staff and resident pathologists.

147. Affirmed as modified. Dr. Wecht initially paid $15.00 and later $25.00 each to the autopsy technician, histologist, photographer, and medical secretary, if used, from his own funds to assist in the private autopsies.

[46] 148. Refused. (Dr. Wecht's private autopsies were scheduled for periods that would not interfere with the performance of the jurisdiction autopsies at ACCO.)

149. When a private autopsy was scheduled, the supervisor of ACCO autopsy technicians would arrange for assistance for Dr. Wecht from staff employees of ACCO who worked shifts other than the time for performance of the autopsy.

150. The 72 private autopsies included in the surcharge would constitute an average of eight per year if spread over the nine year period.

151. The actual dates of the 72 private autopsies were principally 1974 and later.

152. Dr. Wecht could have performed all of these autopsies at Central Medical Pavillion without charge to him.

153. Since February 1979, Dr. Wecht has performed no private autopsies at ACCO, but has performed private autopsies at Central Medical Pavillion Hospital.

154. Affirmed as modified. Dr. Wecht as Coroner of Allegheny County had the power and authority by statute to arrange for the performance of his private autopsies at ACCO with approval of the County Commissioners which he failed to obtain.

155. Dr. Wecht replaced all expendable materials used in the performance of his private autopsies at ACCO.

156. Affirmed as amended. The use of ACCO to perform the private autopsies by Dr. Wecht did not cause damage or depreciation to the building or equipment. (and caused no loss to Allegheny County).

157. Refused as repetitive. (The performance of private autopsies at ACCO by Dr Wecht provided a

benefit to Allegheny County as an educational aid to the professional employees of ACCO.)

159. Dr. Wecht was consulted on a number of cases which had in some way been assigned an ACCO number or in which ACCO had issued a death certificate.

160. Some of these deaths did not result in an autopsy by anyone.

161. Some of the autopsies in these cases were performed in hospitals in Allegheny County and not at ACCO.

162. Affirmed as modified. Dr. Wecht may have had nothing to do with these cases coming under the jurisdiction of ACCO or having an ACCO identification number issued to them.

[47] 163. Affirmed as modified. Typically, Dr. Wecht would be retained at some period (significantly) later than the death to study various documents, including hospital records and to render private expert opinions.

164. Refused. (In an ACCO jurisdiction case, the Coroner can be compelled to state the fact of his Office's determination but cannot be compelled to study records to formulate an expert opinion on the cause of death or other medical/legal issue and give that opinion in connection with private litigation.)

165. Affirmed as modified. There is no indication that Dr. Wecht used any of the personnel of ACCO or ACCO facilities in performing the services, giving rise to the fees earned by him in the consulting (in these) cases.

Appendix D—Adjudication of the Court of Common Pleas of Allegheny County, Pennsylvania.

166. The intervention of ACCO with the death of an individual within Allegheny County could not preclude Dr. Wecht's later retention as a private forensic pathologist to study documents and render a medical opinion.

167. Dr. Wecht communicated with his clients on these cases through his Frick Building private medical/legal consulting office and used private stationery with that address.

168. Dr. Wecht used the stationery of PP&T when reporting on private autopsies performed by him.

169. Affirmed as modified. The Coroner(s) of Westmoreland County, Leo Bacha, (other counties) retained Dr. Wecht and his colleagues because of their personal professional expertise and not as Coroner or employees of ACCO.

170. Affirmed as modified. ACCO stationery was used to report on out-of-county autopsies and toxicologies. (since the funds received were going into the Professional Education Fund bank account for use at the Coroner's Office.)

171. Refused. (The Professional Education Fund was not maintained as a secret account.)

172. Affirmed as modified. Its existence was known to some (many) employees of ACCO.

173. Affirmed as modified. The use of PP&T surgical specimens at ACCO was known to some ACCO employees. (not a secret).

174. Refused. (This practice was known to many employees of ACCO.)

175. Affirmed as modified. The nearly daily delivery and pickup of surgical specimens at ACCO by an employee of PP&T was not hidden. (open and obvious.)

[48] 176. Refused. (There exists no statutory or other prohibition denying the Coroner of Allegheny County the right to perform any of the activities for which Dr. Wecht is sought to be surcharged.)

177. Affirmed as modified. Some (Many) of the row officers of Allegheny County engage in private businesses, professions, and other money-making activities while being elected officials of Allegheny County.

[49] *CONCLUSIONS OF LAW*

1. This Court has both jurisdiction and venue to hear the two Surcharges involved.

2. Jurisdictional autopsies are defined in the Act of 1953, July 28, P. L. 723, art. XII, §§1233 and 1236 [16 P. S. §§4233 and 4236].

3. There is no statutory right for the Allegheny County Coroner's Office or its Coroner to create or maintain a Toxicology Division or Department.

4. By the Constitution of Pennsylvania the Coroner as a County Officer is to be paid only by salary as provided by law for services performed for the County or any other governmental unit. He is obligated to pay directly to the County fees incident to the conduct of his office.

5. By statute the Coroner as part of his oath is required to declare that he will not knowingly receive directly or indirectly any monies or other valuable considerations for the performance of his duties while in office other than that allowed by law.

6. Coroner Wecht had a duty to report to Allegheny County through the Office of the Controller all monies received as a result of performing out-of-county autopsies, or pathology work, or related services.

7. Coroner Wecht could not legally have a financial interest in any company or laboratory dealing with the Coroner's Office.

8. Controllers Lynch and Lucchino were required by law to investigate any monies that may have been held by Coroner Wecht which he received for services rendered to others in his capacity as Coroner, or by the Allegheny County Morgue.

[50] 9. There was no fraud or collusion as to Dr. Wecht proved by clear indubitable evidence.

10. The Act of 1945, May 15, P. L. 538, No. 210, §1 [65 P. S. §191] applies to the Lynch Surcharge case. In so doing, the Court must consider the results of Dr. Wecht's acts to determine whether or not there have been benefits derived by Allegheny County therefrom.

11. The County Commissioners could not have lawfully entered into a contract with Pittsburgh Pathology and Toxicology Lab as long as Dr. Wecht was personally interested, directly or indirectly, in the contract.

Appendix D—Adjudication of the Court of Common Pleas of Allegheny County, Pennsylvania.

12. The Act of 1945, May 15, P. L. 538, No. 210, §1 [65 P. S. §191] relied upon by the defense was repealed and cannot be used by the defense as to the Lucchino Surcharge.

13. In late 1978 the Pennsylvania legislature passed the Act of 1978, October 4, P. L. 883, No. 170, §1 [65 P. S. §401] which denies to any public official or public employee the obtaining of any financial gain through holding his public office other than the compensation permitted by law.

14. The Coroner has statutory authority to make general rules and regulations for the government and control of the County Morgue and to determine who shall use the County Morgue facilities.

15. The Coroner is not required as a part of his duties as Coroner of Allegheny County to perform autopsies, histology or toxicology for out-of-county coroners or hospitals.

[51] 16. All fees earned by Dr. Wecht in his individual capacity for the performance of autopsies at the requests of attorneys or families of the deceased, or to do histology or toxicology work in connection with such cases, or the rendering of professional advice to such families, is not subject to surcharge. All of the disbursements from the Professional Education Fund did not benefit Allegheny County or its taxpayers.

17. Acts complained of in the two Coroner's Surcharge Reports constituting the basis of the Surcharge did result in actual financial loss sustained by the County of Allegheny as found in this Surcharge.

Appendix D—Adjudication of the Court of Common Pleas of Allegheny County, Pennsylvania.

Defendant's Proposed Conclusions of Law are denied unless incorporated in the Court's Conclusions of Law. The Controller did not submit Proposed Conclusions of Law.

BY THE COURT:

ALBERT E. ACKER *J.*
Albert E. Acker, *Judge*
Specially Presiding

May 10, 1983

APPENDIX E

Constitutional Provisions and Statutes Involved

U.S. Const. art. I, §10 cl. 1

> No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

U.S. Const. Amend. XIV, §1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Act of 1945, May 15, P.L. 538 Nos. 210, 538, *formerly* 65 P.S. §§191, 192 (Act of 1945)

> §191. Surcharges to be Limited to Actual Loss
>
> No elected or appointed official of any political subdivision shall be surcharged for any act, error or omission in excess of the actual financial loss sustained by the political subdivision by reason thereof, and the surcharge of any such official shall

take into consideration as its basis, the results of such act, error or omission and the results had the procedure been strictly according to law.

* * * *

§192. Application of Act

The provisions of this act shall not apply to cases involving fraud or collusion on the part of such officers, nor to any penalty enuring to the benefit of, or payable to, the Commonwealth.

Act of 1978, Oct. 4, P.L. 883, No. 170 §1, 65 P.S. §401 *et seq.* (Act of 1978).

§401. Purpose

The Legislature hereby declares that public office is a public trust and that any effort to realize personal financial gain through public office other than compensation provided by law is a violation of that trust. In order to strengthen the faith and confidence of the people of the State in their government, the Legislature further declares that the people have a right to be assured that the financial interests of holders of or candidates for public office present neither a conflict nor the appearance of a conflict with the public trust. Because public confidence in government can best be sustained by assuring the people of the impartiality and honesty of public officials, this act shall be liberally construed to promote complete disclosure.

* * * *

Appendix E—Constitutional Provisions and Statutes Involved.

§403. Restricted Activities

(a) No public official or public employee shall use his public office or any confidential information received through his holding public office to obtain financial gain other than compensation provided by law for himself, a member of his immediate family, or a business with which he is associated.

* * * *

(b) No person shall offer to give a public official or public employee or candidate for public office or a member of his immediate family or a business with which he is associated, and no public official or public employee or candidate for public office shall solicit or accept, anything of value, including a gift, loan, political contribution, reward, or promise of future employment based upon any understanding that the vote, official action, or judgment of the public official or public employee or candidate for public office would be influenced thereby.

* * * *

(c) No public official or public employee or a member of his immediate family or any business in which the person or a member of the person's immediate family is a director, officer, owner or holder of stock exceeding 5% of the equity at fair market value of the business shall enter into any contract valued at $500 or more with a governmental body unless the contract has been awarded through an open and public process, including prior public notice and subsequent public

disclosure of all proposals considered and contracts awarded. Any contract made in violation of this subsection shall be voidable by a court of competent jurisdiction if the suit is commenced within 90 days of making the contract.

* * * *

(d) Other areas of possible conflict shall be addressed by the commission pursuant to paragraph (9) of section 7.

* * * *

(e) No former official or public employee shall represent a person, with or without compensation, on any matter before the governmental body with which he has been associated for one year after he leaves that body.

* * * *

(f) No person shall use for any commercial purpose information copied from statements of financial interests required by this act or from lists compiled from such statements.

* * * *

(g) No former executive-level State employee may for a period of two years from the time that he terminates his State employment be employed by, receive compensation from, assist or act in a representative capacity for a business or corporation that he actively participates in recruiting to the Commonwealth of Pennsylvania or that he actively participated in inducing to open a new plant, facility

or branch in the Commonwealth or that he actively participated in inducing to expand an existent plant or facility within the Commonwealth provided that the above prohibition shall be invoked only when the recruitment or inducement is accomplished by a grant or loan of money or a promise of a grant or loan of money from the Commonwealth to the business or corporation recruited or induced to expand.

* * * *

(h) (1) Any individual who holds an appointive office in any political subdivision shall not have an interest in any contract or construction in which that political subdivision shall enter or have an interest.

* * * *

(2) Any person violating the provisions of this subsection shall be barred for a period of five years from engaging in any business or contract with any political subdivision or the Commonwealth or any of its agencies.

* * * *

(3) For purposes of this subsection the term "interest" shall not include the ownership of shares of stock in any corporation in an amount of 5% or less of the total issue for said corporation.

* * * *

Supreme Court, U.S.
FILED
DEC 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-783

In The
Supreme Court of the United States
October Term, 1986

CYRIL H. WECHT, M.D., J.D.
Former Coroner,

Petitioner,

vs.

ALLEGHENY COUNTY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

JAMES J. DODARO, ESQUIRE
IRA WEISS, ESQUIRE*
BYRD R. BROWN, ESQUIRE
LOUIS S. GOLD, ESQUIRE
300 Fort Pitt Commons
445 Fort Pitt Boulevard
Pittsburgh, Pennsylvania 15219
(412) 644-1140

Attorneys for Respondent

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

I. WHETHER THE COURT MAY ASSUME JURISDICTION PURSUANT TO 28 U.S.C. § 1257(3) WHEN THE PETITIONER'S CONSTITUTIONAL CLAIM OF THE DENIAL OF DUE PROCESS WAS NEVER PRESENTED TO THE COURT BELOW.

II. WHETHER THE PETITIONER HAS PRESENTED ANY BASIS FOR THE GRANTING OF A WRIT OF CERTIORARI UNDER SUPREME COURT RULE 17.1(b)(c).

III. WHETHER THERE IS A BASIS FOR THE GRANTING OF A WRIT OF CERTIORARI IN A PURELY STATE MATTER INVOLVING INTERPRETATIONS OF STATE STATUTES REGARDING THE CONDUCT OF PUBLIC OFFICIALS.

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STATEMENT OF THE CASE

This matter is before the United States Supreme Court on the Petition for Writ of Certiorari to the Supreme Court of Pennsylvania filed by Cyril H. Wecht, M.D., J.D.

This matter arises out of a judgment entered in the Court of Common Pleas of Allegheny County which was affirmed by the Commonwealth Court of Pennsylvania. The Supreme Court of Pennsylvania denied a Petition for Allowance of Appeal filed by Dr. Wecht.

The Petitioner was the duly elected Coroner of Allegheny County, Pennsylvania and served as Coroner of Allegheny County from January, 1970 to January, 1980. Petitioner established a checking account at the Mellon Bank and Trust Company on January 19, 1970. This account was titled "Cyril H. Wecht, M.D., 542 Fourth Avenue, Pittsburgh, PA 15219." Petitioner established a checking account at Mellon Bank and Trust Company on or about February 5, 1974 entitled "Cyril H. Wecht, M.D., 542 Fourth Avenue, Pittsburgh, PA 15219." In February, 1979, Dr. Wecht established yet another account at Mellon Bank, N.A. entitled "Professional Education Fund." The Petitioner had control and authority over the Mellon Bank accounts which authority included disbursements made from said accounts.

Petitioner, in his capacity as Coroner of Allegheny County, directed and authorized the performance of post-mortem examinations and toxicology specimen testing for Coroners of other counties in Pennsylvania to be performed at the Allegheny County Coroner's office by employees of Allegheny County during their normal work day using equipment, slides and materials owned by Allegheny

County. Revenues generated by such autopsies and related histologies/toxicology testing performed at the Allegheny County Morgue as stated above were deposited in the Mellon Bank accounts maintained by the petitioner as above identified.

This activity was never reported to the Board of County Commissioners, the governing authority of Allegheny County, and that body never authorized the performance of post-mortem examinations or toxicology specimen testing and related services for out-of-county Coroners and hospitals to occur at the Coroner's office using County equipment, employees, facilities, supplies and materials. Furthermore, the Commissioners never authorized the Petitioner to deposit the revenue of this business venture in his personal bank accounts. Out-of-county hospitals and Coroners for which services were rendered were billed by the Coroner's Office of Allegheny County. They were directed to make payments to Cyril H. Wecht, Coroner of Allegheny County. Dr. Wecht, rather than reporting the receipts on his transcript fee account or turning the same over to the County of Allegheny, deposited said funds in his private bank accounts and made disbursements from same at his discretion.

The Petitioner owned Pittsburgh Pathology and Toxicology Laboratory, Inc., a private business corporation which existed under the laws of the Commonwealth of Pennsylvania. One of the business purposes of this corporation was the processing, testing and examination of clinical specimens for physicians and hospitals. Histology specimens accepted by this laboratory were delivered to the Allegheny County Morgue under the control of the Peti-

tioner as Coroner for testing from 1970 through 1978. This laboratory received fees, as the result of histology services rendered and performed at the Allegheny County Coroner's Office using employees, equipment, materials and supplies of Allegheny County. The Petitioner failed to report this practice to the County Controller or the Board of Commissioners and failed to pay Allegheny County for the histology services performed by these employees using County equipment and material and supplies, which services were rendered solely on behalf of the Pittsburgh Pathology and Toxicology Laboratory.

During County Salary Board meetings from 1970 through 1979 and while seated as a member pursuant to the Second Class County Code, 16 P.S. § 4825, the Petitioner failed to disclose that he maintained private bank accounts in which he deposited fees generated, which were neither reported nor turned over to the County Treasurer. The Petitioner withheld information from the Allegheny County Salary Board, during its meetings at which Petitioner was seated as a member as Coroner, regarding private salary arrangements he made with his then Chief Pathologist Dr. Joshua Perper or other additional compensation arrangements he developed with other employees of the Morgue who performed work related to the out-of-county autopsies, private autopsies and histology/toxicology testing. The Petitioner failed to obtain authorization from or approval by the County Board of Commissioners for use of the Morgue, its facilities, equipment and supplies as well as the utilization of county employees in the performance and testing services for the laboratory owned by a corporation of which he was sole shareholder. Petitioner further failed to report to the Allegheny County

Controller as required by the Second Class County Code, 16 P.S. § 4802, any of the fees received by his solely-owned corporation from 1970 through 1978 in performance of the services which formed the basis of the Lynch surcharge. The Petitioner failed to report to the Controller as required by said Second Class County Code, any of the fees received by him in 1979 in performance of the services which formed the basis of the Lucchino surcharge. The Petitioner further withheld payment to Allegheny County of all fees generated by him in performing autopsies for out-of-county Coroners, histology/toxicology testing and private autopsies at the Morgue. A non-jury trial was held in the Court of Common Pleas of Allegheny County and on May 10, 1983, the Court entered an opinion surcharging the Petitioner $172,410.99. After the filing and consideration of exceptions to the May 10, 1983 opinion the Court on September 8, 1983 issued an opinion increasing the surcharge to $252,462.03.

The Petitioner filed an appeal to the Commonwealth Court of Pennsylvania which affirmed the September, 1983 decision on March 5, 1985. Pursuant to the Judicial Code of Pennsylvania, Dr. Wecht filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania. The Supreme Court denied said petition on August 18, 1986.

On November 14, 1986, the Petitioner filed the instant petition with this Honorable Court.

———o———

ARGUMENT

I. THE COURT MAY NOT ASSUME JURISDICTION PURSUANT TO 28 U.S.C. § 1257(3) WHEN THE PETITIONER'S CONSTITUTIONAL CLAIM OF THE DENIAL OF DUE PROCESS WAS NEVER PRESENTED TO THE COURT BELOW.

A Petition for a Writ of Certiorari must fail when the alleged unconstitutionality of the state statute was never presented to or considered by the highest state court having jurisdiction over the matter. The Supreme Court may exercise jurisdiction pursuant to 28 U.S.C. § 1257(3) only if the record affirmatively demonstrates that the constitutionality of the state statute was raised in the proceedings below and the highest state court in entering its decision was required to consider the federal question for a determination of the case, *U.S. ex. rel. Herge v. Commonwealth of Pennsylvania,* 89 F. Supp. 636 (D.C. Pa. 1950).

The case at bar fails to meet either of the criteria stated in that this Petitioner did not challenge the constitutional validity of the Act of May 15, 1945, P.L. 538, formerly 65 P.S. § 191-192 or the Act of October 4, 1978, P.L. 883, 65 P.S. § 401 *et seq.* Throughout the extensive and lengthy proceedings before the trial court and the appellate proceedings, the Petitioner did not raise any constitutional issue. Rather, the heart of the Petitioner's case was that the courts' interpretation of the statute was incorrect as applied to his activities as County Coroner. The Petitioner consistently sought to carve out an exception for himself as to the state courts' interpretation of the applicable statutes. The record is void of any allegation that the Petitioner was denied due process.

In order to restrict the court's mandatory jurisdiction, this court has consistently refused to accept jurisdiction when the state court has not had the opportunity to review the federal question presented for the first time in a Petition for a Writ of Certiorari. *Minnick v. Gardner,* 292 U.S. 48, 54 S. Ct. 567, 78 L. Ed. 1116 (1934); Cert. granted, 291 U.S. 659, 54 S. Ct. 378, 78 L. Ed. 1047; *Wilson v. Cook,* 327 U.S. 474, 66 S. Ct. 663, 90 L. Ed. 793; *Pennsylvania R. Company v. Illinois Brick Company,* 297 U.S. 447, 56 S. Ct. 556, 80 L. Ed. 796; Reh'g den'd, 297 U.S. 728, 56 S. Ct. 666, 80 L. Ed. 1011; and *Boughton v. Exchange Bank,* 104 U.S. 427, 26 L. Ed. 765 (1981). The Petitioner having failed to preserve any federal question in the proceedings below effectively deprives this court of jurisdiction and the Petition for Writ of Certiorari must be denied.

II. THE PETITIONER HAS PRESENTED NO BASIS FOR THE GRANTING OF A WRIT OF CERTIORARI UNDER SUPREME COURT RULE 17.1(b)(c).

A reading of the Petition for Writ of Certiorari and the reasons contained therein fails to disclose any basis for granting the petition under the considerations set forth in Supreme Court Rule 17.1(b)(c). The essence of the Petitioner's case rests upon the denial of the exception contained in a state statute relating to surcharges, 65 P.S. 191.

The Petitioner has cited no authority, either in the state system or a federal decision which affords him a basis for relief. The primary authority cited by the Petitioner, *Marks v. United States,* 430 U.S. 188 97 S. Ct. 990,

51 L. Ed. 2d 260 (1977) and *Bouie v. City of Columbia*, 397 U.S. 347, 84 S. Ct. 1697 (1964) both deal with the retroactive application of a judicial standard in a *criminal* case. The Petitioner has cited no authority for the proposition that an alleged retroactive application of a standard in a *civil* case affords any basis for federal relief. A review of the applicable decisions in the state courts clearly reveals that it has been well-settled in Pennsylvania that the "Actual Loss Exception" is available only to parties acting under authority of law. As the trial court noted, the existence of legal authority for the attempted activity is critical for the application of that exception (Appendix C—Petition for Writ of Certiorari—pp. 45(a)-47(a)). *Davis v. Carbon County*, 369 Pa. 322, 85 A.2d 862 (1952); *Appeal of Yenerall*, 165 Pa. Super. 144, 67 A.2d 565 (1948).

It has been specifically found in the instant case that the activities of the Petitioner were beyond the authority of his office or "*ultra vires*". (Opinion of Commonwealth Court of Pennsylvania, Appendix B—Petition for Writ of Certiorari, p. 6(a)-fn. 12 p.9(a)). That being the case, it is well-settled in Pennsylvania law that the exception or defense the Petitioner seeks is simply not available to him under a long-standing series of Pennsylvania cases. (Opinion of Commonwealth Court of Pennsylvania, Appendix C—Petition for Writ of Certiorari, pp. 45(a)-47(a)). The Petitioner has demonstrated no federal authority for the proposition that a mere interpretation by a trial or appellate court of a long-standing precedent in state law affords the basis of any federal relief.

Moreover, in the second surcharge or the Lucchino surcharge, the statute in question does not contain a "Actual Loss Exception" and the arguments set forth by the

Petitioner with respect to that statute simply have no basis.

The Petition for Writ of Certiorari should be denied.

III. THERE IS NO BASIS FOR THE GRANTING OF A WRIT OF CERTIORARI IN A PURELY STATE MATTER INVOLVING INTERPRETATIONS OF STATE STATUTES REGARDING THE CONDUCT OF PUBLIC OFFICIALS.

The arguments presented by the Petitioner to torture federal issues out of what are essentially state and local matters demonstrate clearly that there is simply no basis for federal intervention in the case at bar. A review of the lower court opinions in this case appearing in the appendices to the Petition for Certiorari, clearly demonstrates that this issue has been extensively litigated and briefed in the courts of Pennsylvania and the Supreme Court of Pennsylvania has declined to review those decisions which have consistently been against the position asserted by the Petitioner in those cases. As has been previously noted, the constitutional claim is being raised before this court for the first time.

The Appellate Courts of Pennsylvania, as has been demonstrated in this Brief, have spoken to this issue consistently many times. The Supreme Court of Pennsylvania found no important issue of first impression to justify the granting of an allowance of appeal under the statutes of Pennsylvania. It is respectfully submitted that no basis has been demonstrated for federal jurisdiction in this case either, and the Petition for Writ of Certiorari should be denied.

———o———

CONCLUSION

The denial of the Petition for Allowance of Appeal by the Pennsylvania Supreme Court affirmed the decision of the Commonwealth Court of Pennsylvania which merely upheld a long-standing line of Pennsylvania cases interpreting state statutes relating to the conduct of public officials in the course of their duties. A reading of these cases and the federal authority cited by the Petitioner reveals no federal issue for adjudication by this Court. For these reasons and the reasons stated within, the Petition for Writ of Certiorari to review the decision below should be denied.

Respectfully submitted,

JAMES J. DODARO, ESQUIRE
County Solicitor

IRA WEISS, ESQUIRE
Deputy County Solicitor

BYRD R. BROWN, ESQUIRE

LOUIS S. GOLD, ESQUIRE

300 Fort Pitt Commons
445 Fort Pitt Boulevard
Pittsburgh, Pennsylvania 15219
(412) 644-1140

Attorneys for Respondent